Newacres Sdn Bhd v Sri Alam Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-9 OF 1996 (W)

CHONG SIEW FAI CJ (SABAH & SARAWAK), ZAKARIA YATIM AND ABU MANSOR FCJJ

25 JANUARY 2000

Civil Procedure *— Judgments and orders — Inconsistency in court order — Supreme Court order ambigious — Supreme Court made authoritative affirmation of existence of fiduciary relations between parties — Trial judge misconstrued Supreme Court order in determining issues of fiduciary duties — Delay — Whether case ought to be sent back High Court — Whether Court of Appeal should interprete order according to pleadings instead of considering surrounding circumstances*

Contract *— Damages — Breach of fiduciary duties — Joint venture agreement — Whether agreement established fiduciary relationship between parties — Whether breach of fiduciary duties proved — Disgorgement of profits — Whether measure of damages should be as per agreement — Extent of breach considered*

Contract *— Damages — Interests — Claim for — Wrongfully depriving of another's use of money — Whether should be compensated by award of interest*

The respondent ('Sri Alam') concluded a joint venture agreement ('the JVA') with the appellant ('Newacres') whereby Newacres agreed to develop a piece of land owned by Sri Alam. Disputes arose between the parties and Sri Alam filed an action praying for a declaration that Newacres was in breach of its fiduciary duties and Sri Alam was entitled to a sum of not less than RM189,341,378.88 and other reliefs. The High Court found that Newacres had not acted in breach of fiduciary duties and Sri Alam was not entitled to receive the sum claimed. Sri Alam appealed to the Supreme Court. The Supreme Court allowed the appeal and ordered that judgment be entered for Sri Alam on the issue of liability as claimed in prayer (1) of the re-amended statement of claim, ie a declaration that Newacres had acted in breach of its fiduciary duties. The Supreme Court further ordered that the case be remitted for trial for assessment by another High Court judge to determine the extent of the fiduciary duties and any breach thereof and to assess what sum of money or other entitlement Sri Alam was entitled to receive. The case was brought for hearing before the High Court whereby the High Court judge found that there was inconsistency in the Supreme Court order. The judge found that there was fiduciary relationship between the parties but concluded that Newacres was not in breach of its fiduciary duties and dismissed Sri Alam's claim. Sri Alam appealed to the Court of Appeal. The Court of Appeal agreed with the High Court that there was a contradiction in the Supreme Court order but said that the judge should have complied with the remaining directions of the Supreme Court order and identified Sri Alam's entitlement under the JVA. The Court of Appeal allowed Sri Alam's appeal and entered judgment against Newacres for various sums of money (see *Sri Alam Sdn Bhd v Newacres Sdn Bhd* [1997] 1 MLJ 297). Newacres appealed.

Held :

(1) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Having regard to the pleading and bearing in mind the need to harmonize as far as possible the seeming ambiguity in the Supreme Court order, the court considered that the Supreme Court had decreed a sound and workable order though that order could have been better expressed with the choice of more precise words (see p 375F–G).

(2) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) The Supreme Court had entered judgment against Newacres for breaches of fiduciary duties and ordered assessment of Sri Alam's entitlements. The entry of judgment was an authoritative affirmation of the finding by the Supreme Court of the existence of fiduciary relations between the parties. The trial judge had misconstrued the Supreme Court order when he ignored the judgment entered by the Supreme Court and proceeded to determine the issues of fiduciary duties (see pp 377A–B, 378A).

(3) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) An appeal to the Court of Appeal was by way of re-hearing and the Court of Appeal had all the powers and duties of the High Court and was entitled to 'draw inferences of facts, give any judgment and make any order which ought to have been given or made, and make such further or other orders as the case requires' by virtue of s 69(1) and (4) of the Courts of Judicature Act 1964. The Court of Appeal was entitled and proper in proceeding to assessment to save time and costs. To send this case back to the High Court again would inevitably lead to further prolongation of proceedings involving further delay and increased costs. Furthermore all material evidence would appear to have been before the Court of Appeal. In the circumstances, justice was better served that this court proceeded to determine the case including the question of compensation (see pp 378B, D, 379A–C).

(4) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Disgorgement of profits is not the only remedy for breach of fiduciary duty. The measure of compensation is to put a plaintiff in a position he would have been had the breach not been committed. In the present case, as the pleadings showed, Sri Alam relied on the JVA to establish the fiduciary duty. In the circumstances there was no reason why the measure of compensation could not be that in the JVA. The Court of Appeal was not precluded from relying on the provisions in the JVA when assessing compensation for any breach on the part of Newacres (see p 376G, 378G–H).

(5) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) By the pleadings the parties had joined issue on the question of set-off. It was no longer a question resting on technicality of pleadings, ie pleading an essential element before the issue of set-off could be raised. Apart from that, having regard to the matters as to pleadings, the whole circumstances of the case including the development in the

implementation of the JVA and the Court of Appeal's return of the balance of the sale proceeds by Newacres to Sri Alam under cl 5(a) of the JVA without it being specifically pleaded, justice must be done to both parties and deduction or set-off in Newacres' favour ought to be permitted. Furthermore, just as Sri Alam's claims of entitlements, Newacres' claims of set-off arose from the same JVA upon which Sri Alam's claims of breaches of fiduciary duties relied, and the relationship between the respective claims was such that it would be manifestly unjust to allow one party's claims to be enforced without regard to those of the other. This was a case where the whole matter should be dealt with and Sri Alam's entitlements settled, after deducting all that ought to be deducted in respect of Newacres' claim of set-off (see pp 384I–385D).

(6) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) It is only fair that interest be awarded against the person who wrongfully deprives another from the use of the latter's money. In the instant case, Sri Alam should be compensated for the loss thereby occasioned to them. Mere replacement of the money after more than a decade was insufficient compensation. Sri Alam should be compensated by an award of interest (see p 385E–F).

(7) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Sri Alam was not entitled to any of the industrial units because they were built on land that Newacres saved from not building their own entitlement of low cost flats. Accordingly the award by the Court of Appeal of 36 light industrial units or total sales value of RM21,600,000 was set aside (see pp 390H, 391G–H).

(8) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) The Supreme Court had ordered judgment against Newacres for breaches of fiduciary duties. On the other hand, the luxury apartments in this case had not been built. That being so, Newacres could not be said to be in breach of their fiduciary duties for not giving Sri Alam something new which had not been built. In the circumstances, it would not be right and reasonable to require Newacres to deliver Sri Alam's share of the apartments or in lieu thereof to pay the sale value thereof as ordered by the Court of Appeal. Therefore, the order of the Court of Appeal was set aside (see pp 392I–393B).

(9) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Since Sri Alam had got its share of 56 semi-detached houses, the site for building Newacres's 106 semi-detached houses which were not built ought to belong to Newacres (see p 393B–C).

(10) (Per **Zakaria Yatim FCJ**) In the absence of a written judgment from the Supreme Court, the Court of Appeal should have looked at the pleadings and in particular the prayers thereto, instead of looking at all the surrounding circumstances (see p 398E).

(11) (Per **Zakaria Yatim FCJ**) The Supreme Court declared that Newacres had acted in breach of its fiduciary duties. The case was remitted to the High Court to determine the extent of the breach of fiduciary duties. In other words, the Supreme Court had found that there was a breach but the Supreme Court did not decide what was the extent of the breach. The High Court judge was given the task of determining the extent of the breach so as to enable him to assess the sum of money or other entitlement Sri Alam was to receive (see p 399D, G–H).

(12) (Per **Zakaria Yatim FCJ**) From the clauses of the agreement, it was clear that the agreement was a joint venture agreement. The court was also satisfied that the agreement established fiduciary relationship between Sri Alam and Newacres. Accordingly, Newacres owed fiduciary duties to Sri Alam. The Supreme Court had rightly declared that Newacres was in breach of its fiduciary duties (see p 403C–D, F).

(13) (Per **Zakaria Yatim FCJ**, dissenting) In respect of the light industrial unit, there was a clear breach of fiduciary duties. Newacres would derive greater profit and advantage from the fiduciary relationship. Sri Alam was therefore entitled to a certain percentage of the profits. The court awarded Sri Alam a sum of RM21,630,000 replacing the Court of Appeal's award of RM21,600,000 (see pp 408G, 409C).

(14) (Per **Zakaria Yatim FCJ**) The land where the remaining units of semi-detached houses were to be built belonged to Newacres. The order of the Court of Appeal in respect of the 1,600 luxury apartments was set aside (see p 409E–G).

[Bahasa Malaysia summary

Responden ('Sri Alam') telah menyempurnakan satu perjanjian usahasama ('PUS tersebut') dengan perayu ('Newacres') di mana Newacres bersetuju untuk membangunkan sekeping tanah yang dipunyai oleh Sri Alam. Pertikaian telah timbul antara pihak-pihak berkenaan dan Sri Alam telah memfailkan satu tindakan memohon satu deklarasi bahawa Newacres telah melanggar kewajipan fidusiari dan Sri Alam berhak kepada sejumlah tidak kurang daripada RM189,341,378.88 dan relif-relif lain. Mahkamah Tinggi mendapati bahawa Newacres tidak bertindak melanggari kewajipan-kewajipan fidusiari dan Sri Alam tidak berhak untuk menerima jumlah yang dituntut. Sri Alam telah membuat rayuan kepada Mahkamah Agung. Mahkamah Agung telah membenarkan rauan tersebut dan memerintahkan bahawa penghakiman dimasuki bagi pihak Sri Alam mengenai persoalan liabiliti sebagai mana yang dituntut di dalam permohonan (1) kepada penyataan tuntutan pindaan semula, iaitu satu deklarasi bahawa Newacres telah bertindak melanggari kewajipan

A fidusiarinya. Mahkamah Agung selanjutnya telah memerintahkan agar kes tersebut diremitkan untuk perbicaraan untuk penilaian oleh hakim Mahkamah Tinggi yang lain bagi menentukan tahap kewajipan fidusiari tersebut dan apa-apa pelanggarannya dan untuk menilai berapa jumlah wang atau hak yang Sri Alam berhak menerima. Kes tersebut telah dihadapkan untuk perbicaran di Mahkamah Tinggi di
B mana hakim Mahkamah Tinggi mendapati bahawa perintah Mahkamah Agung tidak konsisten. Hakim tersebut mendapati bahawa terdapat hubungan fidusiari antara pihak-pihak berkenaan tetapi mencapai persetujuan bahawa Newacres tidak melanggar kewajipan fidusiarinya dan menolak tuntutan Sri Alam. Sri Alam telah
C membuat rayuan kepada Mahkamah Rayuan. Mahkamah Rayuan telah bersependapat dengan Mahkamah Tinggi bahawa terdapat percanggahan di dalam perintah Mahkamah Agung tetapi menyatakan bahawa hakim tersebut sepatutnya menuruti dengan arahan-arahan yang lain di dalam perintah Mahkamah Agung tersebut dan mengenalpasti hak Sri Alam di bawah PUS tersebut. Mahkamah
D Rayuan membenarkan rayuan Sri Alam dan memasuki penghakiman terhadap Newacres bagi pelbagai jumlah wang (lihat *Sr Alam Sdn Bhd Newacres Sdn Bhd* [1997] 1 MLJ 297). Newacres telah membuat rayuan.

E **Diputuskan**:

(1) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Setelah mengambil kira pliding tersebut dan memperingatkan tentang keperluan untuk mengharmonikan setakat mana mungkin ketaksaan di dalam perintah Mahkamah Agung, mahkamah telah berpendapat bahawa Mahkamah Agung mendekrikan satu
F perintah yang kukuh dan dapat dilaksanakan walaupun perintah tersebut boleh dinyatakan dengan lebih jelas dengan pilihan penggunaan perkataan yang lebih terperinci (lihat ms 375F–G).

(2) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Mahkamah Agung telah memasuki penghakiman terhadap Newacres kerana
G pelanggaran-pelanggaran kewajipan fidusiari dan memerintahkan penilaian hak-hak Sri Alam. Kemasukan penghakiman tersebut merupakan satu pengakuan yang diberi kuasa tentang penemuan oleh Mahkamah Agung mengenai kewujudan hubungan fidusiari antara pihak-pihak tersebut. Hakim perbicaraan telah menyalah-tafsirkan perintah Mahkamah Agung apabila beliau tidak
H memperdulikan penghakiman yang dimasuki oleh Mahkamah Agung dan telah terus menentukan persoalan-persoalan tentang kewajipan fidusiari (lihat ms 377A–B, 378A).

(3) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Suatu rayuan kepada Mahkamah Rayuan adalah melalui perbicaraan semula
I dan Mahkamah Rayuan mempunyai kuasa dan kewajipan keseluruhan Mahkamah Tinggi dan berhak untuk 'mendapat fakta-fakta inferens, memberi apa-apa penghakiman dan membuat apa-apa perintah yang sepatutnya diberikan atau

dibuat, dan membuat perintah-perintah seterusnya atau selainnya mengikut keperluan kes' menurut s 69(1) dan (4) Akta Kehakiman Mahkamah 1964. Mahkamah Rayuan berhak dan adalah betul di dalam meneruskan penilaian untuk menjimatkan masa dan kos. Untuk menghantar balik kes ini kembali kepada Mahkamah Tinggi melibatkan kelwatan dan kos yang lebih. Tambahan pula, semua keterangan material akan nampaknya seperti telah dihadapkan di Mahkamah Rayuan. Di dalam keadaan tersebut, keadilan lebih baik dilaksanakan di mana mahkamah terus menentukan kes tersebut termasuklah persoalan pampasan (lihat ms 378B, D, 379A–C).

(4) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Penyerahan kembali keuntungan bukan satu-satunya remedi untuk pelanggaran kewajipan fidusiari. Ukuran pampasan adalah dengan meletakkan plaintif di dalam kedudukan seperti di dalam keadaan di mana beliau tidak melakukan pelanggaran tersebut. Di dalam kes ini, sebagai mana yang ditunjukkan oleh pliding tersebut, Sri Alam telah bergantung kepada PUS tersebut untuk mewujudkan kewajipan fidusiari tersebut. Di dalam keadaan ini, tidak ada sebab kenapa ukuran pampasan tersebut tidak boleh sedemikian di dalam PUS tersebut. Mahkamah Rayuan tidak dikecualikan daripada bergantung kepada peruntukan-peruntukan di dalam PUS tersebut apabila menilai pampasan untuk apa-apa pelanggaran di pihak Newacres (lihat ms 376G, 378G–H).

(5) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Melalui pliding-pliding tersebut, pihak-pihak berkenaan telah menggabungkan isu tentang persoalan penepian. Ia bukan lagi merupakan satu persoalan yang berdasarkan keteknikan pliding, iaitu membuat pliding untuk elemen penting sebelum isu penepian dapat ditimbulkan. Selain daripada itu, dengan mengambil kira perkara-perkara berhubung dengan pliding-pliding tersebut, keseluruhan keadaan kes ini termasuklah perkembangan di dalam pelaksanaan PUS tersebut dan pemulangan baki keuntungan jualan oleh Mahkamah Rayuan daripada Newcres kepada Sri Alam di bawah fasal 5(a) PUS tersebut tanpa ia dipohon secara khusus, keadilan patut dilaksanakan kepada kedua-dua pihak dan pemotongan atau penepian yang menyebelahi Newacres sepatutnya dibenarkan. Tambahan pula, seperti mana Sri Alam telah menuntut hak-haknya, tuntutan Newacres untuk penepian telah timbul daripada PUS yang sama yang digantung oleh Sri Alam dalam tuntutannya terhadap pelanggaran kewajipan fidusiari, dan hubungan antara tuntutan tersebut adalah sebegitu rupa sehinggkan adalah tidak adil langsung untuk membenarkan tuntutan suatu pihak dikuatkuasakan tanpa mengambil kira yang lain. Ini merupakan satu kes di mana keseluruhan perkara hendaklah ditangani dan hak-hak Sri Alam diselesaikan, setelah memotong semua yang

A patut dipotong berhubung dengan tuntutan penepian Newacres (lihat ms 384I–385D).

(6) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Adalah hanya adil jika faedah diawardkan terhadap individu yang telah menidakkan hak seorang yang lain daripada menggunakan wangnya sendiri. Di dalam kes ini, Sri Alam sepatutnya diberikan pampasan untuk kerugian yang dialami olehnya. Hanya dengan penggantian wang tersebut setelah lebih daripada sedekad tidak merupakan pampasan yang mencukupi. Sri Alam sepatutnya diberikan pampasan dengan satu award berdasarkan faedah (lihat ms 385E–F).

(7) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Sri Alam tidak berhak ke atas apa-apa unit-unit perindustrian kerana unit-unit ini telah dibina atas tanah yang Newacres telah selamatkan daripada tidak membina unit-unti flat kos rendah yang mereka berhak. Sewajarnya, award oleh Mahkamah Rayuan tentang 36 unit-unit perindustrian ringan atau nilai jualan keseluruhan sejumlah RM21,6000,000 telah diketepikan (lihat ms 390H, 391G–H).

(8) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Mahkamah Agung telah memerintahkan penghakiman terhadap Newacres untuk pelanggaran kewajipan fidusiari. Sebaliknya, apartmen-apartmen mewah di dalam kes ini tidakpun dibina. Oleh demikian, Newacres tidak boleh dikatakan telah melanggar kewajipan fidusiarinya dengan tidak memberikan sesuatu yang baru kepada Sri Alam yang belum lagi dibina. Di dalam keadaan ini, adalah tidak betul dan munasabah untuk menghendaki Newacres menyerahkan bahagian daripada apartmen Sri Alam atau sebagai gantinya membayar nilai jualannya sebagai mana yang diperintahkan oleh Mahkamah Rayuan. Oleh itu, perintah Mahkamah Rayuan telah diketepikan (lihat ms 392I–393B).

(9) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Memandangkan Sri Alam telah mendapat 56 buah rumah berkembar daripada bahagiannya, kawasan pembinaan 106 buah rumah berkembar Newacres yang belum dibina tersebut sepatutnya dimiliki oleh Newacres (lihat ms 393B–C).

(10) (Oleh **Zakaria Yatim HMP**) Dengan ketiadaan satu penghakiman bertulis daripada Mahkamah Agung, Mahkamah Rayuan hendaklah melihat kepada pliding-pliding tersebut dan terutamanya permohonan-permohonan tersebut, berbanding dengan melihat kepada semua keadaan sekeliling (lihat ms 398E).

(11) (Oleh **Zakaria Yatim HMP**) Mahkamah Agung telah membuktikan bahawa Newacres telah bertindak melanggari kewajipan fidusiarinya. Kes tersebut telah diremitkan kepada Mahkamah Tinggi untuk menentukan tahap pelanggaran kewajipan fidusiari tersebut. Dalam erti kata lain, Mahkamah Agung mendapati bahawa terdapat pelanggaran tetapi

Mahkamah Agung tidak memutuskan apakah tahap pelanggaran tersebut. Hakim Mahkamah Tinggi telah diberikan tugas untuk menentukan tahap pelanggaran tersebut supaya membolehkan beliau menilai jumlah wang atau hak-hak lain yang patut diterima oleh Sri Alam (lihat ms 399D, G–H).

(12) (Oleh **Zakaria Yatim HMP**) Daripada fasal-fasal perjanjian tersebut, adalah jelas bahawa perjanjian tersebut merupakan satu perjanjian usaha sama. Mahkamah juga telah berpuas hati bahawa perjanjian tersebut telah mewujudkan hubungan fidusiari antara Sri Alam dan Newacres. Sewajarnya Newacres patut mempunyai kewajipan fidusiari kepada Sri Alam. Mahkamah Agung telah dengan betul membuktikan bahawa Newacres telah melanggari kewajipan fidusiarinya (lihat ms 403C–D, F).

(13) (Oleh **Zakaria Yatim HMP**, menentang) Berhubung dengan unit perindustrian ringan tersebut, terdapat pelanggaran kewajipan fidusiari yang jelas. Newacres akan mendapat keuntungan dan kelebihan yang lebih daripada hubungan fidusiari tersebut. Sri Alam oleh itu berhak terhadap peratusan tertentu keuntungan tersebut. Mahkamah telah mengawardkan kepada Sri Alam sejumlah RM21,630,000 menggantikan award Mahkamah Rayuan sejumlah RM21,600,000 (lihat ms 408G, 409C).

(14) (Oleh **Zakaria Yatim HMP**) Tanah di mana unit-unit rumah berkembar yang masih tinggal akan dibina adalah milik Newacres. Perintah Mahkamah Rayuan berhubung dengan 1,600 buah apaartmen mewah tersebut telah diketepikan (lihat ms 409E–G).]

Notes

For a case on inconsistency in a court order, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2761.

For cases on damages in contract generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras1955–2051.

Cases referred to

Brian Pty Ltd v United Dominions Corp Ltd [1983] 1 NSWLR 490 (refd)

Commonwealth Bank of Australia v Smith (1991) 102 ALR 453 (refd)

Dawson, Re [1966] 2 NSWR 211 (refd)

Day v Mead [1987] 2 NZLR 443 (refd)

Hanak v Green [1958] 2 QB 9 (refd)

Federal Commerce Ltd v Molena Alpha Inc [1978] 1 QB 927 (refd)

Forbes v Git & Ors [1922] 1 AC 256 (refd)

Glynn & Ors v Margetson & Co & Ors [1893] AC 351 (refd)

Liggett Kensington [1993] 1 NZLR 257 (refd)

Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (refd)

Mondel v Steel (1841) 8 M & W 858 (refd)

Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184 (refd)

Nand Kumar v Emperor AIR 1937 Patna 534 (refd)
New Zealand Netherland Society v Kuys & Anor [1973] 2 All ER 1222 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)
Nocton v Lord Ashburton [1914] AC 932 (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)
Robinson v National Bank of Scotland [1916] SC (HL) 154 (refd)
Seth Manakchand v Chaube Manoharlal & Anor AIR 1944 PC 46 (refd)
State of Bihar v Ghulam Sarwar AIR 1965 Patna 393 (refd)
Sri Alam Sdn Bhd v Newacres Sdn Bhd [1997] 1 MLJ 297 (refd)
Strand Music Hall Co Ltd, Re (1865) 35 Beav 153 (refd)
Topanmal Chhotamal v M/S Kundomal Gangaram & Ors AIR 1960 SC 388 (refd)
United Dominions Corp Ltd v Brian Pty Ltd (1984–85) 157 CLR 1 (refd)
Wallersteiner v Moir (No 2) [1975] 1 All ER 849 (refd)
Woods v Martins Bank Ltd & Anor [1959] 1 QB 55 (refd)

Legislation referred to

Evidence Act 1950 ss 3, 74
Courts of Judicature Act 1964 s 69(1), (4)
Rules of the High Court 1980 O 18 r 22

Appeal from: Civil Appeal No W–02–660 of 1995 (Court of Appeal, Kuala Lumpur)

VK Lingam (*Oommen Koshy* and *R Thayalan* with him) (*Mohamed Ismail & Co*) for the appellant.
V Manokaran (*Jasmeetpal Singh* and *C Natarajan* with him) (*Wan Majid, Mano & Nada*) for the respondent.

Chong Siew Fai CJ (Sabah & Sarawak):

Introduction

This is an appeal by Newacres Sdn Bhd ('the developer') against the decision of the Court of Appeal entering judgment against them for Sri Alam Sdn Bhd ('the landowner') in a number of reliefs to which I shall allude in greater detail in the later part of this judgment. Owing to the complexity of the case (the memorandum of appeal alone contained 38 grounds), the arguments before this court spanned intermittently over about 13 days, at the conclusion of which, judgment was reserved to a date to be fixed. I now give my judgment.

Background facts

The facts heralding the dispute between the parties herein may be thus stated. In 1975, the landowner, though not a licensed developer, was desirous of developing its newly acquired 584 acres (approximately) of land

into a residential estate cum commercial centre. To that end, they started selling unsubdivided empty lots to about 2,100 purchasers with an undertaking to construct residential and other buildings on the said lots. A

For brevity, suffice it that the landowner ran into serious financial problems necessitating a rescue plan to salvage the project. This resulted in a joint venture agreement dated 2 October 1980 ('JVA') between the landowner and the developer. Clause 15 of the JVA provided, inter alia, that subject to certain payments to be made to and a guarantee to be executed in favour of the landowner, the land was to be transferred to the developer (which transfer was subsequently effected and completed) and that the developer was permitted to develop the land. In return, the landowner was to get certain entitlements in residential and commercial buildings in the said project as provided in cll 5 and 22 of the JVA. It may be noted that cl 15 thereof provided for the transfer of the land to the developer 'subject always to the company's [landowner's] entitlement under cl 5(a) hereof and the properties described thereof being held by the developer on trust for the company.' B C

Unfortunately, discord arose over the implementation of the JVA resulting in the landowner filing a suit against the developer (Suit No C 30 of 1985) which marked the beginning of a long and protracted litigation process between the parties, which, in view of its essentiality in the understanding of this appeal, deserves a brief mention. D

It must be understood that the term 'the landowner' used in this judgment is purely for convenience since the land in question had been transferred to the developer. E

Litigation history

Suit No C 30 of 1985 commenced by the landowner was heard before Abdul Razak J, and resulted in the making of a consent order on 21 January 1985. So far as concerning the suit presently under appeal, the only notable point respecting the consent order was the provision that: F

> (4) Plaintiff to apply to court for a proper construction and interpretation of the joint venture agreement as to respective entitlements of the parties thereunder, with liberty for plaintiff to lead evidence on existence of a collateral contract without prejudice to defendant; ... . G

Pursuant to the above order, the landowner on 2 October 1985 took out an Originating Summons No C 189/85 against the developer seeking, inter alia, a declaration that the landowner was entitled to no less than RM226,336,730.59 minus all sums received by the landowner as at the date of the order to be made in the originating summons. H

Several affidavits were filed in support and in opposition to the originating summons. In view of serious disputes of facts, Abdul Razak J ordered the said originating summons to be converted into a writ action. Consequent thereto, both parties filed their pleadings which subsequently underwent various amendments. I

The re-amended statement of claim of the landowner alleged against the developer various misdeeds pertaining to the implementation of the JVA

with the main relief under prayer (1) claiming a declaration that the developer had acted in breach of its fiduciary duties to the landowner.

The developer's further re-amended defence contended, inter alia, that there was no dispute in the implementation of the agreement.

They alleged that the JVA was in substance a sale and purchase agreement, and therefore there was no fiduciary relationship between the parties. The developer also pleaded set-off and/or counterclaim for, inter alia, compensation for bungalow lots amounting to RM29,880,000 as well as compensation for delayed delivery which they had paid on the landowner's behalf under sale and purchase agreements entered into by them on the landowner's behalf.

Needless to say, the proceedings, at all stages, had been hotly contested.

Though not crucial to this appeal before us, I would, for the sake of completeness in the narration of the litigation history, mention that, at the trial of the converted writ action, the developer raised two preliminary objections which were dismissed by Anuar Zainal Abidin J (as he then was) on 21 March 1991. The developer's appeal against the decision of Anuar Zainal Abidin J was dismissed by the Supreme Court on 18 October 1991. The trial proper then proceeded.

On 14 August 1992, Anuar Zainal Abidin J dismissed the landowner's claim with costs and allowed the developer's counterclaim for RM29,880,000 being compensation for not being able to retain 100 units of bungalow lots which the landowner had pre-sold before the JVA was entered into. Against the decision of 14 August 1992, the landowner appealed to the Supreme Court.

Next came a crucial turn in the legal dispute between the parties. On 9 December 1993 the Supreme Court allowed the landowner's appeal. In view of its importance and its inseverable link to this appeal I consider it necessary to reproduce the material parts of the Supreme Court order of 9 December 1993 which reads as follows:

> ...
>
> [1] IT IS ORDERED that this appeal be allowed and the order of the trial judge reversed and set aside AND [2] IT IS FURTHER ORDERED that judgment be entered for the appellant on the issue of liability as claimed in prayer (1) of the Amended Statement of Claim AND [3] IT IS FURTHER ORDERED that this case be remitted for trial for assessment by another High Court Judge to determine the extent of the fiduciary duties and any breach thereof and to assess what sum of money or other entitlement, if any, the appellant is entitled to receive and any consequential relief thereunder AND [4] IT IS FURTHER ORDERED that the appeal against the counterclaim be allowed and the High Court Judge is to determine any set off AND [5] IT IS FURTHER ORDERED that that half the costs of this appeal and the proceedings in the High Court be awarded to the appellant AND [6] IT IS LASTLY ORDERED that the RM500 deposited by the appellant as security for costs of this appeal be paid to the appellant'. (Square brackets added.)

For clarity, the words 'the appellant' in the above quoted order means the landowner, and the sentence 'the appeal against the counterclaim be allowed' therein means that the counterclaim of the developer was set aside.

In compliance with the said Supreme Court order, the case was remitted to the High Court before NH Chan J (as he then was) for trial which began on 18 April 1994. On the direction of NH Chan J, submissions were made by counsel 'on the extent of the fiduciary duties' and 'any breach of those duties'. This was followed by the developer calling Woo Yip Yee (DW1) the architect in charge of the project showing, inter alia, the shortage of seven bungalow lots. The landowner then called Jalal bin Johari (PW1), the licensed surveyor for the project, to explain, inter alia, the savings of the public utility area. Finally, the developer called Wong Koei Onn (DW2) to present the developer's accounts relating to the developer and the landowner.

At the conclusion of the trial on 20 September 1995, NH Chan J dismissed the landowner's claim with costs holding that there was no breach of fiduciary duties by the developer. Against the said decision, the landowner appealed to the Court of Appeal. The developer also cross-appealed against, inter alia, the learned trial judge's dismissal of their defence of set-off.

On 3 July 1996, the Court of Appeal allowed the landowner's appeal and entered judgment for the landowner decreeing the developer to pay the landowner a total sum of RM55,829,090.57, as well as to deliver to the landowner entitlements to various building units or, in lieu thereof, cash sale values as compensation for breaches of fiduciary duties to the landowner under the JVA. The developer's cross appeal was dismissed with costs. On 16 July 1996 the Court of Appeal, at the request of the landowner, clarified its own order dated 3 July 1996.

On 10 September 1996, the developer obtained leave to appeal against the whole of the decision of the Court of Appeal.

Judgments of the lower courts

(1) The interpretation of the Supreme Court order dated 9 December 1993;

(2) The landowner's entitlements under cll 5 (a) to (e) and 22 of the JVA; and

(3) Set-off as a defence.

Interpretation of the Supreme Court order dated 9 December 1999

The learned trial judge in this judgment expressed the difficulty in interpreting the said Supreme Court order by reason of what he perceived to be the apparent contradiction in the said order. He said:

> In one breath, by order (2), it says 'Judgment is hereby entered for the appellant on liability' which in effect is granting the declaration sought by the plaintiff. The plaintiff had claimed for 'a declaration that the defendant has acted in breach of its fiduciary duties'. In the next breath, by order (3), the Supreme Court orders the case to be sent back to the High Court for trial 'to determine the extent of the fiduciary duties in this case and any breach thereof'.

A After mulling over the dilemma, the learned trial judge said:

> I think the words in order (2) that 'judgment is hereby entered for the appellant on liability' are unnecessary, otherwise, order (3) will have no meaning. They should be disregarded as they made order (2) inconsistent with order (3)'.

B In his opinion, only order (3) prevailed, and by remitting the case to the High Court for trial, what the Supreme Court required him to do was:

> ... to determine the extent or scope of the fiduciary duties owed by the defendant [developer] in this case and any breach of them by the defendant [developer], and to assess the sums (if any) which may be found due to the
C plaintiff [landowner].

After discussing the law, the facts and circumstances of the case, the learned trial judge found that the extent of the developer's fiduciary duty towards the landowner extended only to the position of the developer as a fiduciary in relation to cll 5 and 22 of the JVA. However, for reasons which I shall
D deal with later, he held that there was no breach of those duties by the developer. He, accordingly, dismissed the landowner's claim with costs.

The Court of Appeal, however, took a different view in the interpretation of the Supreme Court order. It held that by entering judgment for the landowner 'on the issue of liability as claimed in prayer (1) of the amended statement of claim' (which prayer (1), as stated earlier, was
E for a declaration that the defendant (developer) had acted in breach of its fiduciary duties), the Supreme Court had, in fact, decreed that the developer was liable to the landowner for breaches of its fiduciary duties. On that basis, the Court of Appeal held that the learned trial judge was wrong in ignoring the entry of judgment by the Supreme Court (item [2] of
F the order) and in preferring item [3] of the order by proceedings to 'determine the extent of the fiduciary duties and any breach thereof,' when he should have proceeded 'to identify the extent of the appellant's [landowner's] entitlements under the agreement, if any, and to assess the same'.

G In arriving at the above conclusions, the Court of Appeal relied on three cases, ie *Forbes v Git & Ors* [1922] 1 AC 256 (PC), *Glynn & Ors v Margetson & Co & Ors* [1893] AC 351 (HL) and *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC). Admittedly, the facts of the three cases differ from those in the case presently under appeal: the first case was on the construction of a building contract, the second dealt with the construction
H of a bill of lading, and the third, on the construction of a statute; but the Court of Appeal distilled from those three cases the following legal propositions which it applied: firstly, that where there were two inconsistent clauses in a contract, the earlier clause prevailed over the later clause (*Forbe*'s case); secondly, that in construing written instrument, like a bill of lading, the paramount consideration was to ascertain the manifest object
I and intention of the contract (*Glynn*'s case); and thirdly, that a purposive approach was to be adopted in interpreting a particular amendment to a statute where to do otherwise would be to cause great incovenience and manifest injustice to a party in the appeal (*Lim Phin Khian*'s case).

In the view of the Court of Appeal, the three cases disclosed one common factor, viz, in 'trying' to reconcile a document that contained words or clauses that were inconsistent or repugnant to each other, the primary consideration was to ascertain the manifest object and intention why such a document came into existence in the first place. Once such a purpose or intention had been ascertained, words or clauses that were inconsistent with such a purpose or intention should be excluded.

The Court of Appeal concluded that 'the main purpose of the Supreme Court Order was to establish the issue of liability if any, and having found so made the other consequential orders and directions as listed at paras (3) to (6) above.' (ie items [3] and [4] herein above). The Court of Appeal was of the view that the learned trial judge should have ignored the later direction of the Supreme Court (ie the direction requiring him to 'determine the extent of the fiduciary duties and any breach thereof') and proceeded to identify the extent of the landowner's entitlements under the JVA if any, and to assess the same.

The Court of Appeal then proceeded to determine the landowner's entitlements under the JVA, which the learned trial judge did not do.

Landowner's entitlements under cll 5(a) to (e), and 22 of the JVA

Clause 5(a) of the JVA spells out the landowner's entitlement as follows:

> The Company shall be allocated the following plots completely developed together with all the necessary infrastructure and amenities by the Developer constructing at its sole cost and expenses the relevant residential, commercial or other buildings on such plots:

Types of Plots	No of Plots
1 Low Costs Houses	1,105
2 Single Storey Terrace Houses	399
3 Low Costs Flats	264
4 Petrol kiosks	2
5 Shophouses	79
6 Double Storey Terrace Houses	198
7 Semi-detached Houses	56

It is common ground that under this cl 5(a), the only item of relevance was the 56 units of semi-detached houses. Even this was rendered otiose at the hearing of the appeal before us because parties agreed that the 56 units of semi-detached houses had already been delivered to the landowner on 26 July 1997. Therefore, no more need be said about them.

However, it must be noted that the award of RM3,920,000 in item (2) of the Court of Appeal order dated 16 July 1996 was arrived at by discounting the compensation of RM8,680,000 due to the developer for not getting 100 bungalow plots. The actual working is as follows:

Landowner's compensation respecting 56 units of semi-detached houses @ RM225,000 per unit (Clause 5(a) of JVA; Appeal Record vol I Pg 98)	..... RM12,600,000

LESS
Developer's compensation for not getting 100 bungalow plots (56 x RM155,000) (Clause 5(c) of JVA; appeal record Vol 1 p 102) RM8,680,000
Balance: RM3,920,000

In other words, the award of RM3,920,000 is the difference between RM12,600,000 (compensation to the landowner for the 56 semi-detached houses) and RM8,680,000 (compensation to the developer for not getting the 100 bungalow plots). That being so, therefore, although the delivery of the 56 semi-detached houses or compensation in lieu thereof is no longer in dispute, the award of compensation to the developer for not getting the 100 bungalow plots is still an issue respecting which I shall deal later.

Clause 5(b) of JVA reads as follows:

> The Company shall be allocated all the bungalow plots as approved in the layout plan as presently approved with all necessary infrastructure and amenities to be constructed at the sole cost and expense of the Developer but without any buildings.

The landowner's case is that in the original layout plan, 149 bungalow plots were provided for but the developer had delivered only 142 plots to the landowner, leaving a balance of seven plots undelivered.

The developer's reason for not delivering the remaining seven plots is that they were obliged to surrender the acreage for these seven plots to Lembaga Lektrik Negara for the erection of a main intake station and a government research station.

The learned trial judge disallowed the landowner's claim for these seven plots holding that the remedy for the landowner in respect of this shortfall lay in contract but no cause of action on contract was pleaded and the cause of action for this particular claim had not accrued when the landowner commenced proceedings in 1985. Furthermore, there was no evidence showing that the developer had made profit at the expense of the landowner in respect of the non-delivery of the seven plots.

The Court of Appeal, on the other hand, awarded the landowner damages in the sum of RM1,008,000 for the loss of the seven bungalow plots, the said sum being calculated on the basis of 6,000 square feet (the area of each plot) x RM24 (the 1994 market price per square foot) x 7.

Clause 5(c) of the JVA provides:

> The company shall compensate the Developer for the profits it has foregone by reason of its not having allowed to retain 100 units of the said bungalow plots and the purchase price received or receivable by the company in respect of the number of plots approved for semi-detached houses hereinbefore allotted to the company shall be utilized towards meeting such profits foregone. The profits foregone shall be determined by taking the difference between the selling or estimated selling price of the said semi-detached houses and the costs or estimated costs of constructing the same in accordance with their specifications and plans.

Contrary to provisions granting entitlements to the landowner, this sub-clause works the reverse. It provides compensation to the developer for not

retaining 100 units of bungalow plots that had been sold by the landowner before the signing of the JVA. The formula for determining the compensation was the difference between the selling or estimated selling price of the semi-detached houses referred to in cl 5(a) and the costs of construction of the said houses.

In his judgment, the learned trial judge did not deal with this aspect of the claim presumably because cl 5(c) was not providing entitlements to the landowner. The Court of Appeal, however, did consider this since the sum of RM3,920,000 awarded in item (2) of its order dated 16 July 1996 was in fact the difference between RM12,600,000 (56 semi-detached houses x RM225,000 under cl 5(a) and RM8,680,000 (compensation for not getting 100 bungalow plots under cl 5(c)). I have adverted to this earlier.

Clause 5(d) of the JVA is in three parts. It provides as follows:

> The company shall also be entitled and be allocated the following:
>
> (i) thirty-five percent (35%) of the cinema unit to be built by the developer at its own cost and expense;
>
> (ii) thirty-five percent (35%) of any extra shop-lots and thirty-three percent (33%) of any extra residential plots fully developed by the developer at its own cost and expense together will all necessary infrastructure and amenities, such extra plots being available on the basis of the Layout Plan as presently approved after survey;
>
> (iii) all portions of the said land required for public use or purpose.

The learned trial judge was of the opinion that the landowner's entitlement to cl 5(d)(i) lay in contract and there was no pleading for such a cause of action. Consistent with his earlier opinion, he also said that at any rate the cause of action had not accrued when the landowner's action was filed in 1985. The learned trial judge gave a similar interpretation to cl 5(d)(iii).

As for cl 5(d)(ii), he was of the opinion that the landowner's entitlements hinged on whether a survey based on the original layout plan had been done because such a survey would determine any excess of units for each category of buildings as spelt out in cl 5(a) out of which the landowner would get 35% of the excess shop-lots and 33% of the excess residential plots. However, he said, since no such survey had been done and it was too late to have it done, cl 5(d)(ii) had become superfluous and was no longer applicable.

The Court of Appeal's discourse on cl 5(d)(i) and (ii), bore relation to the developer's submission before them that the landowner's entitlements (ie 35% of the cinema unit under cl 5(d)(i) and 35% of one unit of supermarket and wet market under cl 5(d)(ii), all of which had not been built) had been taken away by the supplementary agreement entered into by the parties on 24 January 1984. I pause here to say that the said agreement was, in reality, in the form of a letter written by the developer to the landowner proposing to form a separate company to develop the shopping complex, wet market and cinema complex. It was not disputed that the said proposal, though accepted by the landowner, was never implemented. The proposed company was never formed.

The Court of Appeal considered that this supplementary agreement did not take away the landowner's entitlements under cl 5(d)(i) and (ii) because

A the period for completing the landowner's allocation under the JVA had expired in 1988 (eight years from the date of the agreement) or at the latest in 1994 (ie if the extension period of 63 months under cl 21 as contended by the developer — disputed by the landowner — was taken into consideration). The Court of Appeal further reasoned that it was the developer's responsibility to do the said survey because under cl 12(c) the B developer had undertaken to carry out all administrative functions relating to the project, and getting the surveying done, according to Court of Appeal, was an administrative act.

On those reasonings, the Court of Appeal, based on the amounts assessed by the Inland Revenue Department to be the profits derived by the C developer on the three commercial buildings, awarded the landowner the following sums:

(i) RM1,078,000 being 35% of the value of the cinema unit;

(ii) RM3,916,000 being 35% of the value of the supermarket; and

D (iii) RM3,036,000 being 35% of the value of the wet market.

As for cl 5(d)(iii), the Court of Appeal found that after amendments were done to the layout plan in 1983, 16.8 acres of land reserved for public use and purpose had been saved, and that on the 'saved' 16.8 acres land, the developer had built 1600 units of luxury apartments. Following cl 5(a), the E Court of Appeal was of the opinion that the landowner was entitled to 33% of the 1,600 luxury apartments, ie 528 units or RM105,600,000 being the sale value thereof.

Clause 5(e) of the JVA reads:

> F It is hereby declared and understood by the parties hereto in the allocation of the plots and the said buildings under this clause the following principles will apply:
>
> (i) ...
>
> (ii) ...
>
> (iii) that plots allocated to the company shall include thirty-five percent G (35%) of the corner shop-lots and thirty-three percent (33%) of the corner residential houses of each type.

The learned trial judge made no reference to this particular sub-clause in his judgment. The Court of Appeal deferred any award under this entitlement because the sale-figures for the corner shop-lots and corner H residential houses were not available. In its place and by way of clarification made on 16 July 1996 they order the developer to furnished detailed accounts for the said corner shop-lots and houses within two months from the date of their order and to pay the landowner whatever money found due within a further three months from then onwards.

I *Clause 22 of the JVA*

The landowner's next entitlement was embodied in cl 22, the relevant part of which reads:

It is hereby agreed between the parties hereto that the developer shall be entitled at its sole costs and expense to amend the approved layout plan to increase the number of housing plots to be subdivided from the said land PROVIDED ALWAYS that:

(a) Such said amendments shall not affect the area of each of the plots to be allocated to the company under cl 5 hereof and as far as possible not to affect the relative positions of the same;

(b) The company shall be allocated twelve percent (12%) of each type of the building (including corner plots) to be erected by the developer on such increased plots;

(c) ...

(d) ... .

It was the landowner's contention that the original layout plan was amended in 1983 to include 1,600 luxury apartments (built on the saved 16.8 acres of public utility land) and 103 light industrial units measuring 30 x 90, 35 light industrial units measuring 90 x 120, one shopping complex, one medan selera (food court) and one covered car park (built by the developer on an area earmarked for building their own entitlement of 1,566 units of low cost houses). The said amendment also saw an increase of low cost flats being built, from 800 units to 2,640 units, ie an increase of 1,840 units as well as an increase of shophouses, from 226 to 367, ie an increase of 141 units.

The landowner's claim to a share of the luxury apartments had been discussed earlier. In respect of their claims for the other types of buildings under this clause, the learned trial judge maintained that they could not be allowed on the grounds that the claims were contractual in nature and had not been pleaded as such.

On the other hand, the Court of Appeal granted the landowner 12% of the additional 1,840 units of the low cost houses, ie 221 units or in lieu thereof RM16,425,000 being the sales value thereof (based on RM75,000 per unit) and 12% of the additional 141 units of the shophouses, ie 17 units or in lieu thereof RM7,650,000 being the sales value thereof (based on RM450,000 per unit).

As for the light industrial units, the Court of Appeal decided, for reasons not material to this appeal before us, that the landowner was not entitled to a share of the 35 units measuring 90' x 120' and the covered car park. They decided, however, that the landowner was entitled to be given, not 12% but 35% of the 103 light industrial units measuring 30' x 90' ie 36 units or in lieu thereof their sales value of RM21,600,000, 35% of the shopping complex or in lieu thereof its sales value of RM3,284,000 and 35% of the medan selera (sales value unknown). The Court of Appeal accepted 35% rather than 12% as the basis because they were of the opinion that the units were not 'increased' units but new ones, and so the percentage to be used should be that as reflected in the entitlements under cl 5(a) and not cl 22.

Set off as a defence

It was the developer's contention before the lower courts that the defence of set-off was available to them under certain clauses in the JVA namely, clls 4, 6(a) and 12(i).

Clause 4 reads:

> The company hereby expressly agrees that the advance shall be repaid by allowing to the developer to retain out of or set off against the purchase prices of the buildings to be built on the sub-divided plots and allocated to the company in accordance with cl 5 and 22 hereof such purchase price to be paid by the respective purchasers to the developer for account of the company.

The 'advance' mentioned in cl 4 referred to the RM7.5m advanced by the developer to the landowner under cl 2 of the JVA.

Clause 6(a) reads as follows:

> It is hereby expressly agreed that though the company shall bear all conversion fees, sub-division fees and other fees payable to the relevant State Authorities pertaining to or in connection with the present approval for conversion and sub-division of the said land (other than the fees specified in cl 10(b) hereof to be borne and paid by the developer), such said conversion,sub-division and other fees shall be paid by the developer on behalf of the company to the relevant State Authorities on or before the 5th day of November, 1980 and such payment shall not be included but shall be in addition to the advance and recoverable by the developer in the manner as specified for the recovery of the said advance in cl 4 hereof.

Clause 12(i) reads as follows:

> 12 The developer hereby undertakes and agrees with the company that it shall:
>
> (i) After the execution of this Agreement, to make such refunds to the company's purchasers referred to in the recital herein if demanded or requested by the said purchasers upon the understanding that such said refunds so made shall be on behalf of the company and therefore recoverable therefrom in the same manner as specified in cl 4 thereof in relation to recovery of the said advance by the developer and to give full effect to the provisions herein, the developer shall be entitled to negotiate with the said purchasers the manner and amount of the said refunds subject however to the prior approval of the company in each case.

The opinion of the learned trial judge on this issue was that since the landowner did not make a claim for the money collected on its behalf by the developer from the purchasers, the defence of set-off was not available to them.

The Court of Appeal was also of the like opinion, holding that the defence was only available if the landowner had (which the landowner had not) made a claim for the return of all proceeds of sales collected by the developer on the landowner's behalf. However, the Court of Appeal went a step further and ordered the developer, despite the fact that no such claim had been made by the landowner, to refund to the landowner the sum of

RM39,587,090.57 being the balance of the proceeds of sales they had collected on behalf of the landowner. A

On 16 July 1996, the Court of Appeal supplemented its judgment of 3 July 1996 clarifying certain aspects of their judgment, for example on interest. I do not find it necessary to go into details of the supplementary judgment; suffice it that I briefly summarise, the various relevant awards made by the Court of Appeal as clarified by its supplementary judgment. B

Summary of Court of Appeal's awards

The developer was ordered to pay the landowner the following sums:

(i) RM39,587,090.57 being balance of the sale proceeds of the landowner's units under cl 5(a) of the JVA collected by the developer on the landowner's behalf, with interest thereon at 8%pa from the dates of collection to the date of realization; C

(ii) RM1,008,000 representing the value of seven bungalow lots under cl 5(b) with interest at 8%pa from 3 July 1996 until the date of realization; D

(iii) RM1,078,000 representing 35% of the value of the cinema under cl 5(d)(i) with interest at 8%pa from 3 July 1996 until the date of realization;

(iv) RM3,916,000 representing 35% of the value of the supermarket under cl 5(d)(ii) with interest at 8%pa from 3 July 1996 until the date of realization; E

(v) RM3,036,000 representing 35% of the value of the wet market under cl 5(d)(ii) with interest at 8% pa from 3 July 1996 until the date of realization;

(vi) RM3,284,000 representing 35% of the shopping complex under cl 22 with interest at 8%pa from 3 July 1996 until the date of realization; F

(vii) 35% of the food court under cl 22.

The developer was further ordered to deliver to the landowner:

(i) detailed accounts of the cash allocations identifying corner lots within two months from the date of the judgment and if any money was found to be due, the developer was to pay such money within three months after the expiry of the time limited for furnishing the said detailed accounts; G

(ii) 219 increased units of low costs flats under cl 22(b) within three months from 16 July 1996 or in lieu thereof their sales value of RM16,425,000 (calculated on 219 x RM75,000); H

(iii) 17 increased units of 4 storeyed shophouses under cl 22(b) within three months from 16 July 1996 or in lieu thereof their sales value of RM7,650,000 (calculated on 17 x RM450,000); I

(iv) 528 luxury apartments within three months from 16 July 1996 or in lieu thereof their sales value of RM105,600,000 (calculated on 528 x RM200,000); and

(v) 36 light industrial units measuring 30 x 90 within three months from 16 July 1996 or in lieu thereof their sales value of RM21,600,000 (calculated on 36 x RM600,000).

The appeal

As mentioned earlier, the memorandum of appeal contained 38 grounds, some of which were grouped together in the arguments of counsel. As I had indicated in the course of hearing this appeal, we would focus on the issues raised, and the awards challenged (rather than on the specific grounds of appeal as formulated). In the course of so doing, I shall deliberate on submissions of counsel relating to the grounds of appeal. For that purpose, I had, it may be recalled, sought and obtained from counsel a list indicating the various grounds that bore relation to the particular issues and awards.

Interpretation of the Supreme Court order dated 9 December 1993 (Grounds of Appeal Nos 1 to 6 relate to this issue)

Learned counsel for the developer submitted that there was no contradiction in item [2] and item [3] of the said Supreme Court order or, alternatively, if there was, it was urged upon us to remit this case back to the High Court for another retrial. He argued that the Court of Appeal erred in interpreting the said Supreme Court order by suggesting that the learned trial judge should have ignored that part of the order directing another High Court judge to determine the extent of the fiduciary duties and any breach thereof, and also erred in adopting the above interpretation and went on to decide on the landowner's entitlements.

As to *Forbes v Git & Ors* and *Glynn & Ors v Margetson & Co & Ors* cited by the Court of Appeal, counsel for the developer contended that the methods of construction adopted therein should not be applied since those cases were not concerned with the interpretation of a court order. Counsel referred to *Seth Manakchand v Chaube Manoharlal & Anor* AIR 1944 PC 46 in which the Privy Council had to interpret the scope of a foreclosure decree as to whether it encompassed a mortgaged property to which the mortgagees claimed possession. The Privy Council held that 'For the purpose of interpreting a decree no other document is so directly in point as the judgment or can in the nature of things have comparable force.' However, I find little help from *Seth Manakchand* since there is, in our present case, no written grounds of judgment in relation to the Supreme Court order dated 9 December 1993.

For the landowner, counsel submitted that the principles of law distilled in *Forbes* case, and *Glynn* case, were of general application and that a court order was also a document under ss 3 and 74 of the Evidence Act 1950. *Nand Kumar v Emperor* AIR 1937 Patna 534 holding that an order sheet of a court in a case was a public document, and *State of Bihar v Ghulam Sarwar* AIR 1965 Patna 393 to the effect that an order made by a deputy secretary to the state government was a public document were cited.

Counsel further submitted that there was a contradiction or inconsistency in the Supreme Court order dated 9 December 1993 in that

in item [2] of the order, judgment had been entered for the landowner declaring that the developer had acted in breach of fiduciary duties, yet in item [3] thereof the High Court judge was 'to determine the extent of the fiduciary duties and any breach thereof'. Counsel contended that by entering judgment for breaches of fiduciary duties, the Supreme Court must have found the extent of fiduciary duties owed and must have known what duties were breached. Counsel totally opposed to sending the case back to the High Court for retrial.

In reply, learned counsel for the developer submitted that since the landowner's re-amended statement of claim did not seek any relief or entitlements under the JVA, the Court of Appeal erred in granting the landowner the various entitlements thereunder.

I have considered the submissions of counsel for both sides. In my view, there is no contradiction in the Supreme Court order dated 9 December 1993 though, for clarity, more appropriate words could have been used in the order. Before explaining how I come to this conclusion, it would be useful to refer to the legal propositions enunciated in two cases which, in my opinion, are of assistance in construing the Supreme Court order in question.

In *Re Strand Music Hall Co Ltd* (1865) 35 Beav 153, Sir John Romilly MR observed (at p 158):

> The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed.

Though the above quoted passage related to a deed, the declared principle applies, in my view, equally to a court order.

Next, *Topanmal Chhotamal v M/S Kundomal Gangaram & Ors* AIR 1960 SC 388. In that case, Topanmal sued the firm, Kundomal Gangaram, and its partners for recovery of money owed by the said firm. Having obtained judgment in his favour, Topanmal levied execution thereon against both the assets of the firm as well as the personal properties of the partners. Upon objection by the partners, the question arose as to whether the judgment entered permitted execution against the personal properties of the partners. Delivering the judgment of the court, Subba Rao J made the following pertinent observation (at p 390):

> At the worst the decree can be said to be ambiguous. In such a case it is the duty of the executing court to construe the decree. For the purpose of interpreting a decree, when its terms are ambiguous, the court would certainly be entitled to look into the pleadings and the judgment.

Based on the pleadings and the judgment of the lower court, it was concluded that the execution proceedings could only be levied against the assets of the firm and not against the personal properties of the partners.

Now, reverting to the Supreme Court order dated 9 December 1993. Admittedly at a glance, there appears some seeming ambiguity on the face

of the said order in that having entered judgment for liability on prayer (1), ie granting the declaration that the developer had acted in breach of its fiduciary duties, the Supreme Court went on directing another High Court judge 'to determine the extent of the fiduciary duties and any breach thereof'. Unfortunately, we do not have a reasoned judgment on the order. However one is entitled to look at the pleading (*Topanmal Chhotamal v M/S Knndoinal Gangaram*). And, on the propositions enunciated in the two cases immediately cited above, it is, in my opinion, possible to give effect to both item [2] and the first limb of item [3] of the order and what seemingly appeared to be ambiguous vanishes in the face of the pleading of the landowner. Putting it in another way: having regard to the amended statement of claim of the landowner, and since the Supreme Court was minded to allow the appeal by reversing and setting aside the order of Anuar J, (see item [1] of the Supreme Court order dated 9 December 1993), it is understandable why the Supreme Court granted relief in the form of items [2] and [3] contained in the order of 9 December 1993. It may also be noted that the panel constituting the Supreme Court comprised of a strong bench of three experienced learned judges. After reading the appeal record and hearing counsel then representing the parties, the Supreme Court was satisfied that there had been breaches of fiduciary duties. They accordingly allowed the appeal of the landowner, set aside the order of Anuar J, and entered judgment for the landowner in terms of prayer (1) of the amended statement of claim, ie granting the declaration that the developer had acted in breach of its fiduciary duties. However, the amended statement of claim (and similarly the subsequent re-amended statement of claim) pleaded a number of breaches of fiduciary duties on the part of the developer as are evident in paras 13–17 of the pleading. Instead of embarking upon the onerous and tedious task of examining the various pleaded circumstances and testing them against the evidence adduced to ascertain the specific breaches by the developer, the Supreme Court decided to remit the case to another High Court judge for determination or identification of the fiduciary duties that had been breached. Hence the first limb of item [3] of the order dated 9 December 1993.

Thus, having regard to the pleading, and bearing in mind the need to harmonize, as far as possible, the seeming ambiguity in the said Supreme Court order, I consider that the Supreme Court had decreed a sound and workable order though, it might be argued, that the order could have been better expressed with the choice of more precise words.

Breaches of fiduciary duties — Awards contractual in nature

For the developer, submission of counsel next centred on ground 35 (that the Court of Appeal's awards for the landowner were not pleaded or quantified), grounds 7–10 (that the Court of Appeal's awards, which were not justified, were for contractual remedies when the landowner's causes of action were for breaches of fiduciary duties) and grounds 11–13 (that the Court of Appeal erred in reversing NH Chan J's decision and erred in arrogating to itself the jurisdiction to assess the entitlements which, by the

Supreme Court order, was to be exercised by the High Court). I perceive a common thread of argument running through the above-mentioned grounds which is whether the Court of Appeal had the jurisdiction to grant the aforesaid remedies/entitlements given that the landowner's pleading and evidence adduced in the first and the second trials were centred on allegations of breaches of fiduciary duties on the part of the developer. It would, therefore, be expedient to deal with the said grounds together under the above heading.

The main thrust of the argument for the developer, as I see it, was that nowhere was it pleaded in the landowner's re-amended statement of claim that the developer had committed any breach of the JVA but the Court of Appeal had awarded the landowner contractual remedies provided under the JVA. Authorities were cited to show that courts could only grant reliefs prayed in the statements of claim and that the remedies prayed for must be directly linked to the cause of action pleaded in the statement of claim. It was contended that before NH Chan J, the landowner had not adduced any evidence to show any breach of fiduciary duties, and that in the absence of such evidence, the Court of Appeal, as an appellate court, had exceeded its jurisdiction in proceeding to assess the contractual entitlements due to the landowner. Whilst conceding that the hearing before the Court of Appeal was by way of a rehearing, counsel for the developer contended that awards, if any, must be based on the evidence adduced in the High Court below before NH Chan J, whose decision was on appeal before them. Counsel further submitted that for the breach of fiduciary duties, the remedy was an account of profits or disgorgement of profits unlawfully made, not by awarding contractual entitlements under an agreement as in this case.

In reply, counsel for the landowner drew our attention to the fact that, unlike the usual type of cases, the Supreme Court had in this case entered judgment against the developer for breaches of fiduciary duties and ordered assessment of the landowner's entitlements. The Supreme Court's order was final on matters of pleadings and on evidence, and there was no longer any question of Court of Appeal granting the landowner what was outside the pleadings.

As to whether disgorgement of profits was the only remedy for breach of fiduciary duties, counsel for the landowner contended that, besides disgorgement, restitution and compensation were also remedies available and that the remedies given by the Court of Appeal in this case were basically to compensate for the loss suffered by the landowner as a result of the developer's aforesaid breach. He submitted that despite the order of the Supreme Court directing a High Court judge to assess 'money or other entitlement, if any,' the landowner was entitled, assessment was not the exclusive function of the High Court. He further pointed out that the Court of Appeal was, as stated in their judgment, aware that it was not their duty to assess but undertook upon themselves to do so having regard to the protracted proceedings (over ten years) and since the evidence of entitlements were already before them.

A On the question of the jurisdiction of the Court of Appeal it must be borne in mind that the Supreme Court had entered judgment against the developer for breaches of fiduciary duties and ordered, inter alia, assessment of the landowner's entitlements. These, to my mind, are salient features in this case. The entry of judgment is an authoritative affirmation of the finding by the Supreme Court of the existence of fiduciary relations B between the parties, at least in some aspects of the parties' dealings under the JVA.

To digress a little, it was argued that the JVA was strictly a commercial contract and did not import fiduciary relationship. It seems to me that the judicial trend in modern times, particularly in Canada, New Zealand and C Australia leans towards greater readiness of accepting the presence of fiduciary relationship in commercial transactions or arrangements even where the parties were at arm's length and stood on a relatively equal footing. *Nocton v Lord Ashburton* [1914] AC 932 (HL) and *Robinson v National Bank of Scotland* [1916] SC (HL) 154 showed that fiduciary D relationship might arise even though the parties' (solicitors and clients) relationships were founded in contract. In *Day v Mead* [1987] 2 NZLR 443 the defendant-solicitor gave the plaintiff financial advice which later proved disastrous as the company in which the plaintiff invested on the defendant's advice went into receivership not long after the plaintiff's investment. The defendant-solicitor at all material time was a director and shareholder of the E company. The Court of Appeal in New Zealand found that the defendant's failure to give proper financial advice was not only a breach of duty arising out of their contractual relationship as solicitor-and-client but also a breach of fiduciary duty in that the defendant should have referred the plaintiff to an independent solicitor and adviser who would have been able to make inquiries into the financial affairs of the now defunct company. See also F *Liggett Kensington* [1993] 1 NZLR 257 (trader selling non-allocated bullion, held trader a fiduciary); *United Dominions Corp Ltd v Brian Pty Ltd* (1984-85) 157 CLR 1 (Joint-Venture agreement — partnership — relationship fiduciary); *Woods v Martins Bank Ltd & Anor* [1959] 1 QB 55 (Bank by its manager advising potential customer on investment — Held fiduciary relationship existed).

G In *United Dominions Corp Ltd v Brian Pty Ltd*, Dawson J made the following observation which is of interest at p 16:

> Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the H necessary confidence is reposed by the participants in one another.

In our instant case the developer was solely entrusted and authorized to carry out the construction project on the land and, in connection thereto, to do whatever necessary respecting subsequent amendments, plannings and I physical development of the land.

In any event, by reason of the Supreme Court judgment on breaches of liability, it cannot, in my view, be argued that there is no evidence of

breaches of fiduciary or that the Court of Appeal had improperly disturbed the learned trial judge's finding that the developer had not committed any breach of fiduciary duties. In my view, the learned trial judge had misconstrued the Supreme Court order when he ignored the judgment entered by the Supreme Court and proceeded to determine the issues of fiduciary duties, disregarding the judgment. Furthermore, an appeal to the Court of Appeal was by way of re-hearing and the Court of Appeal had all the powers and duties of the High Court and was entitled to 'draw inferences of facts, give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires'. (Section 69(1) and (4) of the Courts of Judicature Act 1964.) In *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 (FC) the trial court did not assess the damages. Delivering the judgment of the Federal Court, Syed Othman J said: 'Section 69(1) of the Courts of Judicature Act gives us all the powers and duties of the High Court in relation to appeals'. Of course, *Multar*'s case, was decided before the creation of the Court of Appeal, but the law applied to that court at the time it made the decision now appealed against. I would add that the Court of Appeal was admirably entitled and proper in proceeding to assessment to save time and costs.

As to the contention for the developer that disgorgement of profits is the only remedy for breach of fiduciary duty, I am in agreement with counsel for the landowner that this is not so. In *Nocton v Lord Ashburton*, Viscount Haldane LJ spoke of 'the old bill in Chancery to enforce compensation for breach of a fiduciary obligation' (p 946).

In *Day v Mead*, the issue of whether monetary compensation is available for breach of a fiduciary duty was called in question. The Court of Appeal in New Zealand accepted that courts, with the mingling of law and equity, must always have the power to compensate by an award of money. In that case, compensation was awarded. See also *Re Dawson* [1966] 2 NSWR 211 (at p 216) and *Commonwealth Bank of Australia v Smith* [1991] 102 ALR 453 (at pp 479–480) where the courts in Australia accepted that compensation might be given for breach of fiduciary duty.

Another objection of the developer was the awards by the Court of Appeal of what might strictly be regarded as contractual entitlements under the JVA for the developer's breaches of fiduciary duties. I do not consider anything objectionable in this regard. The measure of compensation is to put a plaintiff in a position he would have been had the breach not been committed. In our present case, as the pleading shows, the landowner relied on the JVA to establish the fiduciary duty. In the circumstance there is no reason why the measure of compensation cannot be that in the JVA. The Court of Appeal, in my view, was not precluded from relying on the provisions in the JVA when assessing compensation for any breach on the part of the developer. Given the circumstances, this seems a fair way of determining compensation due to the landowner.

For the developer, it was urged upon us to remit the case back to the High Court for retrial. Having considered the matter, I am inclined to take it upon ourselves to dispose of the disputes. This action, commenced in

1985, has gone through 'the tortuous path of being twice sent back to the High Court, once on appeal to the Court of Appeal and twice to the highest court of the land including the present appeal. To send the case back to the High Court again would inevitably lead to further prolongation of proceedings involving further delay and increased costs. Furthermore, all material evidence would appear to have been before the Court of Appeal which took four days to hear the extensive arguments of counsel for both sides on the various issues and the entitlements. We, on our part, have heard counsel for some 13 days. In the circumstances, I consider that justice is better served that this court proceeds to determine the case including the question of compensation.

No argument was advanced before us as to whether each of the specific heads under which the awards of the Court of Appeal were made came within the sphere of fiduciary relation. In the absence of such argument and since I am not inclined to remit the case for further retrial, I would endeavour my best to do ultimate justice between the parties in considering whether those awards can stand. In the circumstance ie devoid of benefit of arguments from counsel, I do not assume that all the heads aforesaid come within the strict confine of fiduciary relation, but even if some are not, it is, in my view, not unjust that we embark upon adjudicating the merits of the awards made by the Court of Appeal. A perusal of the landowner's re-amended statement of claim will show that the various heads aforesaid come within the matters pleaded in general terms in the pleading, see eg para 13 particulars (v)(i), (vi), (vii), (x), (xi), para 15 particulars (b), para 16, para 18 (i) thereof. Further and more importantly, counsel for both sides had been afforded full opportunity to address us on the merits or otherwise of the awards.

Monies collected on landowner's behalf — Developer's set-off

Next, the complaints of the developer were about the Court of Appeal's rejection of their claim to set off the sum of RM39,587,090.57 from the undisputed sum of RM82,617,166 which the developer had collected from purchasers of various units in the project on behalf of the landowner and about the Court of Appeal's order requiring the developer to hand over to the landowner the said sum of RM39,587,090.57.

A brief background facts relating to the issues would be helpful. It was not disputed that pursuant to authorization of the landowner, the developer had collected RM82,617,166 on the landowner's behalf from purchasers of the various units of buildings forming the landowner's entitlement. It was also not disputed that of the said amount of RM82,617,166, the developer had paid the landowner RM43,030,075.43 leaving the balance RM39,587,090.57 detained by the developer. The developer contended that they had a right to set off the said amount of RM39,587,090.57 which they had itemized in their document entitled 'Reply to Deductions made from SA's Cash Entitlements'. This document is reproduced below in full.

2 Reply To Deductions Made From SA's Cash Entitlements

	Particulars	Amount Allegedly Deprived	NA's Comments
a	Interest on advances (R 26 & 29)	RM1,394,410.28	Amount offset is not RM1,394,410.28 but RM1,299,750.22 which was correctly done.
b	Interest paid on SA's behalf for loan from Standard Chartered Bank and Asiavest Merchant Bank (R-81)	RM1,900,000	Lawfully deducted.
c	Deducting for payment in respect of the purchase of Lots 89 & 90 Gate-way Terrace	RM1,719,318	Lawfully deducted.
d	Deducting for interest payment to UMBC	RM4,200,000	Lawfully deducted.
e	Deducting as compensation as per cl 5(c)	RM29,880,000	Adjustment to be made.
f	Deducting as payment for quit rent (R-31 & 32)	RM2,580	Lawfully deducted.
g	Deducting for management fee (R-88)	RM100,508.35	Lawfully deducted.
h	Deducting (depriving) SA of it's own money from sale of 11 units low cost which SA purchased from NA (R-31)	RM484,934	Outside JVA. In any event, sum has been credited to SA
	Total sum allegedly deprived by NA from SA's cash entitlement	RM39,681,750.63	RM39,587,090.57

Note: Except for item (e) above, none of the other deductions were questioned by the SA during the first trial. Since SA had accepted the accounts as correct, they cannot now go back on its admission, ie those accounts cannot be reopened (NE 168B)

Chart 2

We were informed that 'SA' stood for Sri Alam, the landowner, and 'NA' stood for Newacres, the developer.

Counsel for the landowner also intimated that they objected only to items (a) and (e) and the footnote appearing in the said document.

I would first consider the landowner's objection to the said item (a). For the landowner, it was submitted that the JVA did not allow the developer the right to charge interest on the advances it had made on the landowner's

behalf. The developer argued that the landowner had agreed to pay interest for the advances made. Since the developer failed to furnish any proof of such an agreement and the JVA is totally silent on the point, I am of the view that the developer is not entitled to item (a), ie the amended sum of RM1,299,750.22.

Item (e) relates to the amount of compensation payable to the developer under cl 5(c) of the JVA, ie compensation to the developer for not getting the 100 units of bungalow lots which the landowner had pre-sold before the JVA was entered into. Clause 5(c) has been set out in the earlier part of this judgment. In the course of arguments, counsel for the developer stated that the sum RM29,880,000 against item (e), ie 'Deducting as compensation as per cl 5(c)' should be RM25,730,000. The dispute here is the multiplier to be used for calculating the compensation ie whether it should be 166 (the number of semi-detached units on the 1979 layout plan) or 56 (the number of semi-detached units allotted to the landowner). The compensation payable to the developer under cl 5(c) was the profit made or to be made from the sales of the semi-detached houses to be built on 'the number of plots approved for semi-detached houses hereinbefore allotted to the company' (ie to the landowner). The question therefore is: how many such plots were hereinbefore allotted to the landowner. The provision for allocation of semi-detached houses to the landowner is in cl 5(a) 7. Initially, cl 5(a) 7 contained the following sentence:

> The number of such plots is to determined as provided for under sub-cl C hereof.

Reading cl 5(a) 7 with the above quoted sentence together with cl 5(c), it is not possible to ascertain the number of semi-detached houses to be allotted to the landowner. However, at some point of time of which we were not told, the above-quoted sentence was deleted and the figure '56' was substituted therefor. The alteration was initialed. From the above, it is clear that 56 semi-detached houses were allotted to the landowner.

The developer contended that the multiplier was 166. In support of the contention, counsel relied on the minutes of a meeting held on 1 April 1982 wherein the multiplier was stated to be 166.

I am unable to accept the contention of the developer. In my view, the said minutes of meeting relating to the multiplier is inconclusive since it was qualified by the words 'This will be further discussed in the next meeting', and no submission was made before us whether there had been subsequent meeting on the matter, and if there had, what was the outcome of the meeting. Furthermore, before the Court of Appeal the developer did not rely on the minutes of the meeting, and the Court of Appeal, likewise, did not place any reliance upon it. In my view the multiplier should be 56.

Accordingly, the award of the Court of Appeal should, in my opinion, stand. For the loss of the 100 units of bungalow lots, the developer should be entitled to a compensation of RM8,680,000 [ie 56 x RM155,000 (the difference between the selling price and the construction costs of one semi-detached house)].

As regards the footnote in the document reproduced above prepared by the developer to the effect that the landowner objected to item (e) only at

the trial before Anuar J, the landowner contended before us that this was not the case and that they had objected to more than just item (e). In support of this, counsel referred us to the following evidence of PW1 Haji Ismail bin Mohd (landowner's managing director) upon examination in relation to the statement of account 'R p 88':

> If taking the RM29.8m for the compensation and add that to 148,473 the defendant should owe me about RM30m.
>
> I do not agree to the figure RM30,028,473 until I could see the actual account.
>
> I now say I accept the account. I am not going to check the account. I am not going to ask the accountant to go through the account.
>
> Based on the figure the defendant company owes me RM30,028,473.

Having considered the evidence of Haji Ismail bin Mohd I tend to agree with counsel for the landowner that the landowner objected to more than just item (e) and that when Haji Ismail agreed to the sum RM30,028,473 as owing, he merely agreed to the sum arithmetically, based on the figures in the statement of account 'R'.

The next question is whether the developer is entitled to set off this sum of RM8,680,000 as well as items (b), (c), (d), (f), (g) and (h) in the document reproduced above totalling RM17,087,340.35, from RM39,587,090.57 being the balance of the proceeds of sales collected on the landowner's behalf. Counsel for the landowner supported the stand of the learned trial judge and the Court of Appeal that set-off was not available to the developer as a defence because the landowner did not plead for the return of the balance of proceeds of sales from the developer. He contended that the developer could only set off sums which fell within the provisions of cll 4, 6(a) and 12(i) of the JVA but the aforesaid amount of RM17,087,340.35 did not come under the said clauses.

I am unable to agree with the contention. It is equitable set-off that we are concerned. Firstly the order of the Supreme Court dated 9 December 1993 directed 'to determine any set-off.' Secondly, *Hanak v Green* [1958] 2 QB 9 explained the three circumstances under which set-off may be allowed:

(1) Set-off under the Statutes of Set-Off (English) ie 2 Geo 2 C 22 (Insolvent Debtors Relief Act 1728 and 8 Geo 2 C 24 (Set-off Act 1734). Under these statutes, the right to set off was in respect of mutual debts arising from transactions of a different nature which could be ascertained with certainty at the time of the pleading. As in the words of Morris LJ (at p 17):

> '..... the claims on both sides had to be liquidated debts or money demands which could be ascertained with certainty at the time of pleading.';

(2) What is usually termed 'abatement at common law'. Cases in this category are cases on contracts for sales of goods with a warranty and cases for work and labour that come within the rule in *Mondel v Steel* (1841) 8 M & W 858 at p 871. The rule only operates in such cases if the defendant can show that, by reason of the breach of contract by

A the plaintiff, the goods or the work are diminished in value. To that extent the defendant can obtain 'an abatement of price' (Parke B at p 872) as a form of defence; and

(3) What is known as 'equitable set-off'. In the words of Morris LJ in *Hanak v Green* at p 23:

B

> The cases within group (3) are those in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff's claim.

As to the sort of cross-claims that can be deducted by way of equitable set-off, the following observations of Lord Denning in *Federal Commerce Ltd v* C *Molena Alpha Inc* [1978] 1 QB 927 CA is enlightening. After dealing with abatement at common law, he said at pp 974–975:

> But the courts of equity, as was their wont, came in to mitigate the technicalities of the common law. They allowed deductions — by way of equitable set off whenever there were good equitable grounds for directly impeaching the demand which the creditor was seeking to enforce: see *Rawson* D *v Samuel* (1841) Cr & Ph 161 at pp 178–179, per Lord Cottenham LC. These grounds were never precisely formulated before the Judicature Act 1873. It is now far too late to search through the old books and dig them out. Over 100 years have passed since the Judicature Act 1873. During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: E what would the courts of common law or the courts of equity have done before the Judicature Act? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? See *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, per Lord Diplock. This question must be asked in each case as it arises for decision: and then, from case to case, we shall build up a series of precedents to guide those who come after us. But F one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

G It will be noted from the above quoted passage that as regard the element of 'directly impeaching the demand which the creditor was seeking to enforce,' Lord Denning dispensed with the need to ascertain the practice of the courts of common law and that of the courts of equity prior to the Judicature Act, and formulated the tests of close connection between the cross-claims and the plaintiff's demand and as to whether it would be just H to grant the plaintiff's demand without taking the cross-claim into account.

In *Hanak v Green*, the plaintiff sued the defendant builder for £266 for breach of building contract for failing to complete or properly complete certain items of works. The defendant counter-claimed or claimed by way of set-off (1) on a quantum meruit for extra work done outside the contract, I (2) for loss caused by plaintiff's refusal to admit the defendant's workman, and (3) for trespass to the defendant's tools. The county court, revising the report of a referee to whom the claims were first submitted, awarded the plaintiff £74 17s 6d and the defendant £84 19s 3d (made up of £69 11s,

£12 7s 6d and £3 0s 9d on each of the three above items respectively) and ordered the plaintiff to pay the balance of £10 1s 9d to the defendant. The defendant appealed, contending that his counter-claim should be treated as a set-off, and, therefore, the plaintiff should recover nothing, and the defendant should recover £10 1s 9d. In allowing the appeal, the Court of Appeal held, inter alia, that the proper order was judgment for the defendant for £10 1s 9d on the counterclaim since the defendant had, in respect of his three items of claim, on equitable set-off defeated the plaintiff's claim. Sellers LJ said (at p 310):

> In the present case the referee allowed the defendant £12 7s 6d for loss suffered by him because the plaintiff refused access to the defendant's workmen. I would regard that as clearly a matter of equitable set-off as it arises directly under and affected the contract on which the plaintiff herself relies.

His Lordship also allowed the other two items to be set off against the plaintiff's claim on the ground that:

> These two items are *closely associated with and incidental to the contract* of 14 June 1954, on which the plaintiff sues for breach, and in my opinion they also should have been allowed as a set-off. (Emphasis added.)

In the present case under appeal, the landowner claimed, inter alia, a declaration for breaches of fiduciary duties (for which the Supreme Court had entered judgment), entitlement to 'a sum of not less than RM189,341,378.88', alternatively assessment of money or other entitlement, interest on amount found due, etc. (See landowner's re-amended statement of claim). All these sprang from or had the JVA as the base. By para 14 items (a) and (b) of the re-amended statement of the claim the landowner alleged that they were entitled to receive RM189,341,378.88 from the developer. In para 16 of the re-amended statement of claim, the landowner contended that the developer's deduction of RM29,880,000 (should be RM25,730,000 as the developer had conceded above) as compensation was unlawful, which the developer denied and claimed that they were entitled to set off the said sum. (See para 15(2)(e) and 20 of the further re-amended defence). It will be noted that the developer had in fact deducted not only this compensation (which they then reckoned 'to be RM29,888,000) but also other sums as set out in their document entitled 'Reply to deductions made from SA's cash entitlements'.

Both the High Court and the Court of Appeal disallowed the developer's claim of set-off on the ground that such a defence was not available to the developer since the landowner did not claim for the money collected by the developer on its behalf. In my opinion this is too narrow a view to take. It must be remembered that the deduction of RM29,880,000 as compensation took place before the present action was instituted (hence before the pleadings were filed), and it was the landowner who raised the issue of validity or otherwise of the developer's deduction of the sum in their pleading. In answer, the developer contended in their further re-amended defence that they were entitled to set off the amount. Thus by the pleadings, the parties had joined issue on the question of set-off. It was no longer a question resting on the technicality of pleadings, ie pleading an essential

element (eg claiming payment of money collected by others on claimant's behalf) before the issue of set-off could be raised. But apart from the view I have just expressed, I am still of the view that having regard to the matters as to pleadings stated in the paragraphs immediately preceding, the whole circumstances of the case including the development in the implementation of the JVA (eg that contrary to the landowner's contention in para 18(e) of the re-amended statement of claim, the semi-detached houses (60) had in fact been built and completed), and the Court of Appeal's return of the balance of the sale proceeds by the developer to the landowner (under cl 5(a) of the JVA) without it being specifically pleaded, I am of the view that justice must be done to both parties and that the deduction or set-off in the developer's favour ought to be permitted.

I would add that, just as the landowner's claims of entitlements, the developer's claims of set-off arise from the same JVA upon which the landowner's claim of breaches of fiduciary duties relies, and the relationship between the respective claims is such that it would be manifestly unjust to allow one party's claims to be enforced without regard to those of the other. In my view this is a case where the whole matter should be dealt with and the landowner's entitlements settled, after deducting all that ought to be deducted in respect of the developer's claims of set-off.

Accordingly, I would allow the developer to set off the sum of RM17,087,340.35 from the sum of RM39,587,090.57 which is still in the hands of the developer. The result is that the balance of RM22,499,750.22 should be paid over to the landowner.

There remains the question of interest on the said balance of RM22,499,750.22. The landowner contended that they were entitled to interest thereon. I agree. In my view it is only fair that interest be awarded against the person who wrongfully deprives another from the use of the latter's money. In the instant case, the landowner should be compensated for the loss thereby occasioned to them. Mere replacement of the money after more than a decade is insufficient compensation. The landowner should be compensated by an award of interest. Lord Denning MR said in *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 CA at p 855:

> The principles on which the courts of equity acted are expounded in a series of cases of which I would take the judgment of Romily MR in *Jones v Foxall* (1852) 15 Beav 388; of Lord Cranworth LC in *Attorney-General v Alford* (1855) 4 De GM & G 843 at p 851; of Lord Hatherley LC in *Burdick v Garrick* (1870) 5 Ch App 233 at pp 241–242; of Sir WM James LJ in *Vyse v Foster* (1872) LR 8 Ch App 309 at p 333. Those judgments show that, in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position — who has misapplied the money and made use of it himself for his own benefit. The court presumes:
>
> > that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the court directs rests to be made [ie compound interest] ... .
>
> See *Burdick v Garrick* [1870] LR 5 Ch App at 242 by Lord Hatherley LC. The reason is because a person in a fiduciary position is not allowed to make a

> profit out of his trust; and, if he does, he is liable to account for that profit or interest in lieu thereof. A

In the instant case under appeal, the landowner had been wrongfully deprived of the said sum of RM22,499,750.22 for far too long and should be entitled to the relief. In this regard, counsel for the landowner pointed out that this sum was set off by the developer on 10 December 1984. He B referred to the developer's letter of that date (appeal record Vol 3 p 1181). Though counsel for the developer stated that that letter had been withdrawn by a consent order in an earlier action between the parties hereto and four others, this, in my view, does not nullify the deduction of the sum of RM29,880,000 as indeed was shown in the developer's document entitled 'Reply To Deductions Made From SA's Cash Entitlement'. C I accept that the sum of RM29,880,000 was deducted on 10 December 1984.

There shall be interest on RM22,499,750.22 at 8% pa from 10 December 1984 (date of deduction by the developer as per letter in appeal record Vol 3 p 1181) till the date of realization.

D

I do not propose to discuss the remaining grounds of appeal per se but would consider them in the course of dealing with the various awards of the landowner's entitlements as granted by the Court of Appeal. However, before doing so, it is useful to dwell on cl 1 of the JVA since that would facilitate consideration of the propriety or otherwise of the awards made by the Court of Appeal save the set-off which I have dealt with earlier. E

Clause 1 of the JVA

The relevant part of cl 1 of the JVA reads as follows:

> In consideration of the developer paying to the company [landowner] upon execution of this agreement a sum of Dollars Five Hundred Thousand (RM500,000) only ... the company hereby allows the developer to develop the whole of the said land ... UPON THE CONDITION that the developer shall retain free from all encumbrances in accordance with and subject to the provisions of the cll 5 and 22 hereof the balance of the plots to be sub-divided from the said land remaining after the allocation to the company the number of the said lots in accordance with cll 5 and 22 hereof. F G

For the developer, counsel submitted that by cl 1 was meant that after giving the landowner their entitlements under cll 5 and 22, the rest of the land belonged to the developer who could do as they pleased with it, and that if they chose to reduce building the number of their entitlements or chose not to build thier entielements at all, but to build something else not H within the contemplation of the parties to the JVA, they could keep all of whatever they built on the land. For the landowner, however, it was contended that cl 1 was not exhaustive and did not give the developer a blank cheque to do what it wanted with the land. Clause 1, it was submitted, did not contain the words '*own portion of land*'. Therefore, what the developer did with the land would still be subject to the fiduciary obligations I it owed the landowner and they must not pursue any undertaking which would benefit themselves in greater measure than that contemplated by the JVA, to the exclusion of the landowner.

In my view, what the developer was entitled to retain under cl 1 free from all encumbrances were the balance of the plots to be sub-divided from the land after the landowner had received their entitlements under cll 5 and 22, and NOT the whole balance of the land.

Another matter needed to be discussed before going into the entitlements are the figures relied on by the Court of Appeal in handing down the monetary awards in lieu of physical deliveries of the various units of buildings. As mentioned earlier, the Court of Appeal made use of two documents ie document entitled '*Estimated Sales Value of All Units in Taman Sri Muda*' supplied by the developer to the landowner, and document entitled '*Computation of Estimated Profits On the Whole Taman Sri Muda Project*' ('the Inland Revenue figures') which were used by the Inland Revenue Department in assessing tax payable in respect of the said project.

Before us, counsel for the developer took exception to the use of the Inland Revenue figures. The landowner contended that the figures were supplied by the developer themselves to the Inland Revenue Department and relied on a letter dated 29 July 1985 from the Inland Revenue Department to the landowner's accountant in support. For a better appreciation of its effect I reproduce below the relevant parts of the letter:

> Messrs Yusof Oh & Siva
> Chartered Accountants,
> .....
> .....
> Kuala Lumpur.
>
> Tuan,
>
> Re: *Sri Alam Sdn Bhd*
>
> Enclosed herewith are computations on the estimated profits derived by Sri Alam sdn Bhd from the Taman Sri Muda Project.
>
> As you will note the figures are very close to those prepared *by the company* and it is intended to issue an assessment based on these figures. The Department has been trying to arrange a meeting with you or your client since the beginning of May 1985 but you have either postponed or did not turn up at all during appointments made on six occasions.
>
> Yang benar,
>
> Pmg Penolong Pengarah Kanan,
> Pusat Penyiasatan,
> Kuala Lumpur. (Emphais added.)

The landowner contended that the word 'company' in the letter referred to the developer and therefore was evidence that the developer submitted the figures to the Inland Revenue Department. Hence its reliability as a basis for assessing the monetary value of the landowner's entitlements to the various units mentioned in the annexes to the said letter. For the developer, however it was argued that the said word 'company' referred to the landowner, attributing the confusion in the interpretation to the unfortunate way in which the letter was drafted. It was submitted that the developer never sent the figures to the Inland Revenue Department and pointed out that the landowner themselves by the evidence of their witness,

Haji Ismail bin Mohd, had disputed the assessment. The developer suggested that if we were to allow the entitlements as aforesaid, we should order assessment based on the actual sale-values of the units or of certain units or used their own document '*Projected Allocation to Sri Alam Basis II*' as the basis for the said assessment. I will avert to this when dealing with the entitlements. For the time being, the question is whether or not the Inland Revenue figures should stand.

Much may be said about the propriety of using the actual sale-values of various units as the basis for assessment, but that would involve remitting this case back to the High Court for further retrial which I have earlier on expressed my view not to. As for the developer's '*Projected Allocation to Sri Alam Basis II*,' it is, after all, the developer's own accounting document and could easily be labelled with a bias tag should it be used. On the other hand, regardless of who had submitted the Inland Revenue figures and whether the landowner disputed it or not, the said figures would be the closest we could get to impartiality in the sense that whoever submitting them would have been careful enough to give the best values to the units in order to get a beneficial tax assessment for itself. With this consideration in mind, I would, as the Court of Appeal did, accept the Inland Revenue figures as a fair basis for computing the sale-values of the landowner's entitlements in this appeal.

Entitlements

For convenience, I would group the entitlements under the headings: old, new and increased.

Old entitlements

These are made up of:

(a) seven bungalow plots; and

(b) 35% of the cinema, 35% of the supermarket and the wet market.

I regard them as 'old' entitlements because they appeared in the 1979 plan and remained unchanged by subsequent amendments to the layout plan.

(a) The seven bungalow plots

Under cl 5(b), the landowner was entitled to 149 bungalow plots. It was not disputed that 142 plots had been delivered, leaving a balance of seven undelivered. The developer argued that the seven bungalow plots were compulsorily surrendered to Lembaga Letrik Negara ('LLN' for short) for building the main intake station and therefore they should not be made liable to compensate the landowner for the loss. The landowner, however, contended that, on the evidence, there was nothing showing that LLN specifically required the station to be built on the site for the said seven plots and, further contended that the architectural plan placing the station there was done by the architect of the developer.

In reply, counsel for the developer referred to certain correspondences between LLN and the developer's engineer which, they submitted, showed

A that LLN wanted the area for the station. The correspondences are LLN's letter dated 3 March 1981 addressed to the developer's engineer, and the letter dated 3 October 1983 from the developer's architect to LLN (appeal record Vol 11 pp 4295–4298).

The onus of proving that the LLN compulsorily required the site for the
B seven plots to erect the main intake station to the exclusion of other area in the land lay with the developer. The letters referred to and the evidence of DW1, Woo Yip Yii, on the point, in my view, is insufficient or scanty for the purpose. Moreover, under the JVA the developer was solely entrusted to develop the land and to provide the infrastructure and amenities. In carrying out their responsibilities, the developer had a duty to see that the
C landowner would not be unjustly deprived of their entitlements. In my view the Court of Appeal was justified in awarding the landowner the sum of RM1,008,000 for the loss of the seven bungalow plots with interest thereon from 3 July 1996 (date of Court of Appeal's judgment) to date of realization.

D (b) The cinema, the supermarket and the wet market

The landowner's entitlement to 35% of the cinema is beyond all question (cl 5(d)(i)). As regards the landowner's awards of 35% of the values of the supermarket and the wet market respectively, counsel for the landowner
E submitted that the landowner was entitled to them since the two buildings were included in the 1979 plan. Furthermore, at the instigation of the developer, both parties had entered into a supplementary agreement dated 24 January 1984 whereby they agreed to the incorporation of a company to manage the three buildings but up to now the said company had not even been formed.

F For the developer, counsel candidly conceded that they had a weak ground (Ground 30) in this regard but counsel urged upon us to consider assessing the sale-values of the buildings based on the developer's aforementioned document '*Projected Allocation to Sri Alam II*,' which gave a much lower value than the Inland Revenues figures used by the Court of Appeal.
G Likewise, I consider the developer had a weak case on this score, and in view of my earlier decision to use the Inland Revenue figures, I uphold the awards of the Court of Appeal in respect of the three buildings.

This means the landowner is entitled to RM3,916,000 and RM3,036,000 representing 35% of the values of the cinema, the supermarket and the wet market respectively, all with interest at 8%pa from
H 3 July 1996 to the date of realization.

New entitlements

Under the new entitlements are grouped:

I (a) a shopping complex and a food court (medan selera);

(b) 103 light industrial units (30' x 90'); and

(c) 1,600 luxury apartments.

I term these buildings as 'new' because they were not provided for in original 1979 layout plan.

For the developer, counsel submitted that the JVA did not contemplate any type of building other than those contained in the 1979 layout plan and that neither did the JVA provide nor was evidence adduced in the courts below that the developer had agreed to give 33% (for residential) and 35% (for commercial) of the new units to the landowner. While it is true that the JVA contained no express provision as to the landowner's entitlements to the new types of buildings, since the new types of buildings had surfaced and in the light of my construction of s 1 of the JVA (ie that only the balance of the plots then to be subdivided after the allocations to the landowner in accordance with cll 5 and 22 as opposed to the whole balance of the land were to go to the developer), I am of the view that the landowner is not, by reason of non-provision, precluded from being entitled to a share in the new types of building and that the proportions of the landowner's entitlements may best be ascertained from the intention of the parties as reflected from the existing clauses in the JVA pertaining to the parties' entitlements, more particularly cll 5(a) and 5(d)(ii) thereof. Clause 5(d)(ii) expressly stipulated 35% for shop-lots and 33% for residential plots. Though cl 5(a) did not express in percentage, a comparison of the landowner's allocations of the various types of plots therein with the total corresponding types of plots in the 1979 layout plan will show that the landowner's entitlements represented near, if not exactly, 33% and 35% of the residential and the commercial plots respectively. I therefore am inclined to agree with the contention for the landowner that the parties all along had agreed on the formula of 33% residential and 35% commercial in respect of the landowner's entitlements under the JVA. Such a construction on the percentages of the landowner's entitlements to the new plots in general terms would, in my view, be in keeping with the harmonious working of the JVA.

I now come to the various specific items.

(a) The shopping complex and the food court

Before us, no specific or serious challenge was mounted by the developer on the award made by the Court of Appeal in respect of these two buildings. None of the Grounds of Appeal made mention of these buildings. In the circumstance, I affirm the awards of RM3,284,000 representing 35% of the shopping comply with interest thereon at 8%pa from 3 July 1996 till payment and 35% of the food court, which I find fair and reasonable.

(b) The 103 light industrial units

Counsel for the developer submitted that the landowner was not entitled to 35% of the light industrial units because they were built on land that the developer saved from not building their own entitlement of low costs flats. It was not disputed that in the 1979 layout plan, 3,350 units of low cost houses were to be built, and that under cl 5(a) item 1, the landowner was to get 1,105 units, leaving 2,245 units for the developer. As a result of

amendments to the layout plan, the number of low costs houses was reduced to 3,029 units. Out of the 3,029 units, the landowner nevertheless received their 1,105 units and the balance 1,924 units were for the developer. This meant 321 units allotted to the developer were not built. It was the case of the developer that the 103 light industrial units were built on land that was saved from not building their entitlement of the 321 units and that therefore, the landowner was not entitled to a share of the light industrial units.

The landowner contended that they were entitled to 35% of the light industrial units because the developer had already been adequately compensated for the 'loss' of the 321 low costs houses by retaining all the 836 units of the three-storeyed compact houses and by being allocated more of the higher priced Type B low cost houses. The developer refuted this contention on two grounds. Firstly, they claimed that the allocation of the higher and the lower priced low costs houses to the parties had already been pre-determined by the fact that the landowner had pre-sold their entitlement of 1,105 low costs houses before the JVA was entered into and that of the landowner's 1,105 units, there were more of the lower priced Type A than the higher priced Type B. Secondly, the 836 units of the three-storeyed compact houses were part and parcel of the total 3,029 units of low costs houses and also formed part of the developer's own entitlement of 1,924 units of low costs houses. Before us, counsel for the landowner conceded that the 836 units of three-storeyed compact houses constituted part of the 3,029 units of low costs houses.

After considering the arguments of both sides including the landowner's concession aforesaid, I am of the view that the allocation of the low costs houses including the said 836 units to the developer was not intended to be by way of compensation for their not building 321 units of low costs houses. This conclusion is supported by the minutes of the meeting between the parties on 1 April 1982 which clearly shows the reason for the allocation of the units of low costs houses, that is, the minutes shows that at the meeting the landowner agreed that their allocation of the low costs houses would be based on the Type A and the Type B low costs houses, which had been pre-sold by them before the JVA. This coupled with the contention, which I accept, that the 103 light industrial units were built on land that the developer saved from not building their own 321 low costs houses, I agree with the developer that the landowner is not entitled to any of the 103 light industrial units. Accordingly the award by the Court of Appeal of 36 light industrial units (measuring 30' x 90') or total sales value of RM21,600,000 is set-aside.

(c) The 1,600 luxury apartments

A great deal was said by both sides about the luxury apartments presumably because this was the single highest award which, in monetary terms, constitutes about half of the total awards made by the Court of Appeal. As I have earlier mentioned, the Court of Appeal concluded that the 1,600 luxury apartments were 'built on 16.8 acres of public utility land saved by

the developer, and ordered the developer to deliver 528 units thereof to the landowner or pay RM105,600,000 in lieu. For the developer, counsel questioned the decision of the Court of Appeal in two aspects. Firstly, counsel pointed out that, contrary to the finding of the Court of Appeal, the 1,600 apartments were never built. He stated that although these apartments were included in the 1992 amended layout plan, the developer never got off having the building plans drawn or approved. The Court of Appeal was, therefore, wrong in ordering delivery of units which were not constructed. Secondly, these apartments were planned to be built not on the 16.8 acres of saved public utility land but on an area the developer saved from not building their own entitlement of the 106 semi-detached houses. A brief explanation is perhaps, helpful. In the original 1979 layout plan, 166 semi-detached houses were to have been built of which 56 units were for the landowner and the balance 110 for the developer. However, in 1992, the total number of units were amended to 60. Despite that, the landowner received their full share of 56 units (though belatedly on 26 July 1997) and the developer got the remaining four leaving 106 units unbuilt.

The landowner did not challenge that the 1,600 units of luxury apartments had not been constructed. Their argument, however, took a different turn from what they had advanced in the Court of Appeal. For the landowner, it was firstly argued that the 16.8 acres of public utility land saved belonged to the landowner. Clause 5(d)(iii) was relied upon which provided that the landowner was entitled to '*all portions of the said land required for public purpose*'. Then based on the 1992 layout plan, counsel pointed out that the total acreage needed to build the 1,600 apartments was 17.8 acres whereas the area left from not constructing the 106 semi-detached houses was only 7.25 acres, ie obviously insufficient for building 1,600 luxury apartments. Counsel therefore concluded that the developer must have used the 16.8 acres saved from the public utility land for building these luxury apartments. Hence, their right to a share in the said apartments.

In reply, counsel for the developer argued that cl (d)(iii) did not talk about 'saving' of public utility land and contended that the area saved was not confined to one single spot but spread over different locations in the said land. It was also the contention of the developer that any area saved from public use or purpose did not belong to the landowner.

I have considered the submissions of counsel for both sides. On the saving of public utility land, I am of the view that any 'saved' public utility land ought to belong to the landowner. If all portions of the land required for public use or purpose are to be the entitlement of the landowner as stipulated in cl 5 (d)(iii), I fail to see why any land 'saved' therefrom ought not to go to the landowner. However, that, in my view, is insufficient to determine the validity or otherwise of the award of the landowner's share to the 1,600 apartments since it is not clear nor had it been submitted exactly how much of the 'saved' land, if at all, was used to construct the 1,600 apartments. Nevertheless, I am of the opinion that the landowner is not entitled to the claim for the following reason. The Supreme Court had ordered judgment against the developer for breaches of fiduciary duties. On

A the other hand, the apartments in this case had not been built. That being so, the developer could not be said to be in breach of their fiduciary duties for not giving the landowner something new which had not been built. In the circumstance, it would not, to my mind, be right and reasonable to require the developer to deliver the landowner's share of the apartments or, in lieu thereof, to pay the sale-value thereof as ordered by the Court of B Appeal. Accordingly I am of the opinion that the landowner, was not, at least as yet, entitled to a share in the luxury apartments. It follows that I would set aside the order of the Court of Appeal requiring the developer to deliver 528 luxury apartments or, in lieu thereof to pay RM105,600,000 to the landowner. I would add that since the landowner had got its share of 56 C semi-detached houses, the site for building the developer's 106 semi-detached houses which were not built ought to belong to the developer.

The increased entitlements

The increased entitlements are made up of:

D (a) 219 units of low cost flats; and

(b) 17 units of four-storeyed shophouses.

The landowner's claim in this regard rested upon cl 22(b) of the JVA under which the parties agreed that whatever increment to the housing plots of whatever types of buildings resulting from amendments to the approved E layout plan, the landowner shall be allocated 12% of such increased plots with buildings to be erected thereon by the developer.

(a) 219 units of low cost flats

It was not disputed that in the original 1979 layout plan, 800 units of low F cost flats were to be constructed but by the 1983 amendment, the number was 2,640 units, ie an increase of 1,840 units.

For the landowner, counsel contended that they were entitled to 12% of the increased 1,840 units, ie 221 units. Out of the 221 units, they acknowledged having received two units, leaving a balance of 219 units G undelivered. I see no reason why the landowner should be denied of the remainder 219 units. The award of the Court of Appeal in this regard ie delivery of the 219 units or in lieu thereof payment of RM16,425,000 to the landowner stands.

(b) 17 units of four-storey shophouses

H

Similarly in the 1979 plan, the developer was to build 226 units of shophouses out of which 79 were to go to the landowner. The amended 1983 plan provided for 367 shophouses, an increase of 141 units, 12% of which would be 17 units. No valid reason was given as to why the developer should not be liable to the landowner in this regard. I accordingly hold that I the landowner is entitled to these shophouses from the developer and the award of the Court of Appeal in this respect, ie delivery of 17 increased units of four-storey shophouses or, in lieu thereof, payment of RM7,650,000 to the landowner is hereby confirmed.

Lastly, there remains the order of the Court of Appeal requiring the developer to furnish the landowner 'detailed accounts of the cash allocations identifying corner lots' within two months from 16 July 1996, and to pay the landowner whatever money found due, if any, within three months after the expiry of the two months limited for furnishing the detailed accounts. This order was not challenged nor made a subject of contention in this appeal before us. On the assumption that this order had not yet been complied with, I would affirm this order except that the 'two months from 16 July 1996' be amended to read 'two months from the date of the delivery of this judgment.'

Conclusion

In summary, my decisions are as follows:

A Awards of Court of Appeal confirmed

1 Judgment for the landowner in the sum of RM22,499,750.22 (after set-off RM17,087,340.35 from RM39,587,090.57) with interest at 8%pa from 10 December 1984 till payment;

2 The sum of RM1,008,000 to the landowner for the loss of seven bungalow plots with interest thereon at 8%pa from 3 July 1996 (date of Court of Appeal's judgment) till payment;

3 The sum of RM1,078,000 to the landowner representing 35% of the cinema with interest thereon at 8%pa from 3 July 1996 (date of Court of Appeal's judgment) till payment;

4 The sum of RM3,916,000 to the landowner representing 35% of the supermarket with interest thereon at 8%pa from 3 July 1996 (date of Court of Appeal's judgment) till payment;

5 The sum of RM3,036,000 to the landowner representing 35% of the wet market with interest thereon at 8%pa from 3 July 1996 (date of Court of Appeal's judgment) till payment;

6 The sum of RM3,284,000 to the landowner representing 35% of the shopping complex with interest thereon at 8%pa from 3 July 1996 (date of Court of Appeal's judgment) till payment;

7 35% of the food court to the landowner;

8 Delivery of 219 low cost flats or in lieu thereof RM16,425,000 to the landowner:

9 Delivery of 17 units of four-storey shophouses or, in lieu thereof, RM7,650,000 to the landowner; and

10 On the assumption that the order of the Court of Appeal requiring the developer to furnish detailed accounts relating to corner lots NOT having been complied with, to furnish detailed accounts of the cash allocations identifying corner lots to the landowner within two months from the date of the delivery of this judgment and paying the landowner whatever money found due within three months from the expiry of the two months limited for furnishing the detailed accounts.

A B Awards of the Court of Appeal set aside

1 Delivery of 36 light industrial units (measuring 30' x 90') or in lieu RM21,600,000 to the landowner set aside; and

2 Delivery of 528 luxury apartments or in lieu RM105,600,000 to the landowner set aside.

B

General provisions

I would further order that:

(1) Unless already otherwise expressly provided, all the above reliefs, whether in the form of deliveries of buildings or payments in lieu, or payments, are to be validly effected and completed on the part of the developer within two months from the date of the delivery of this judgment.

(2) all sums of money awarded in lieu shall carry interest at 8%pa from the date of expiry of two months commencing from the date of the delivery of this judgment until payment; and

(3) parties are at liberty to apply.

As to costs, since the developer succeeds only partially in this case, I would order that, in the absence of an agreement between the parties, the costs of this appeal be taxed 3/5 of such taxed costs be paid by the landowner to the developer. As regards costs awarded by the Court of Appeal, I agree that the costs at the High Court be awarded to the landowner but the costs of appeal at the Court of Appeal level awarded to the landowner be reduced to 3/5.

Zakaria Yatim FCJ: On 2 October 1980, the respondent, Sri Alam Sdn Bhd (Sri Alam) concluded a joint venture agreement with the appellant, Newacres Sdn Bhd ('Newacres'). Sri Alam is a private company limited by shares and incorporated under the laws of Malaysia. When the agreement was concluded it was the registered proprietor and beneficial owner of a piece of land held under CT No 19542 for Lot 80 Mukim and Daerah of Klang comprising an area approximately 584 acres 3 rods 0 poles ('the said land'). Newacres is a private company limited by shares and incorporated under the laws of Malaysia. Under the joint venture agreement, Newacres agreed to develop the said land in accordance with the terms and conditions contained in the agreement.

A dispute arose between the parties to the agreement, and Sri Alam filed a civil suit No 30 of 1985 against Newacres. On 2 October 1985, Sri Alam filed an originating summons against Newacres. In March 1987 the originating summons was converted into a writ action.

In this action Sri Alam asked for a declaration that Newacres was in breach of its fiduciary duties and that Sri Alam was entitled to receive from Newacres a sum of not less than RM189,341,378.88 and other reliefs. Before the trial of the suit Newacres filed an application to determine preliminary issues. Annuar J, as he then was, dismissed the application. Newacres appealed to the Supreme Court. The Supreme Court dismissed

the appeal with costs. See *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474. A

The trial of the suit then proceeded before Annuar J. After a lengthy trial lasting for 33 days, his Lordship found that Newacres had not acted in breach of fiduciary duties and that Sri Alam was not entitled to receive the sum of RM189,347,378.88. Sri Alam appealed to the Supreme Court. The Supreme Court allowed the appeal and set aside the order of Annuar J. It also ordered that judgment be entered for Sri Alam on the issue of liability as claimed in prayer (1) of the re-amended statement of claim. Prayer (1) asked for a declaration that Newacres had acted in breach of its fiduciary duties. The effect of the Supreme Court order was to enter judgment declaring that Newacres had acted in breach of its fiduciary duties. The Supreme Court further ordered that the case be remitted for trial for assessment by another High Court judge to determine the extent of the fiduciary duties and any breach thereof and to assess what sum of money or other entitlement Sri Alam was entitled to receive. B C

Pursuant to the Supreme Court order, the case was brought for hearing before NH Chan J, as he then was. The learned judge felt that the second part of the order was inconsistent with the third part. In his grounds of judgment he said only the third part of the order prevailed when the case was remitted for trial before him. The learned judge found that there was fiduciary relationship between the parties but he concluded that Newacres was not in breach of its fiduciary duties. The learned judge dismissed Sri Alam's claim with costs. See [1995] 4 MLJ 73. D E

Sri Alam appealed to the Court of Appeal. The Court of Appeal agreed with NH Chan J that there was a contradiction in the Supreme Court order but said that the learned judge should have complied with the remaining directions of the Supreme Court order and identified Sri Alam's entitlements under the joint venture agreement. The Court of Appeal then proceeded to consider Sri Alam's entitlements. The Court of Appeal allowed the appeal and entered judgment against Newacres for various sums of money as stated in the Court's judgment. See judgment of Siti Norma Yaacob JCA in *Sri Alam Sdn Bhd v Newacres Sdn Bhd* [1997] 1 MLJ 297 at pp 332–333. F G

At the hearing of the appeal before this court, the first issue raised was whether there is inconsistency or contradiction in the Supreme Court order. I shall deal with this issue first. The text of the Supreme Court order is reproduced below:

> *THIS APPEAL* Coming on for hearing on the 7th, 8th and 9th day of December, 1993 in the presence of Mr G Sri Ram (together with Mr V Manokaran, Mr Joseph Yeo and Ms Fiona Bodipalar) of counsel for the appellant abovenamed and Mr Lim Kean Chye (together with Encik Mohamed Ismail Shariff, Mr K H Koh, and Mr Oommen Koshy) of Counsel for the respondent abovenamed *AND UPON READING* the Appeal Records filed herein *AND UPON HEARING* Counsel as aforesaid *IT IS ORDERED* that this appeal be allowed and the order that judgment be entered for the appellant on the issue of liability as claimed in prayer (1) of the Amended Statement of Claim. *AND IT IS FURTHER ORDERED* that this case be H I

remitted for trial for assessment by another High Cpurt judge to determine the extent of the fiduciary duties and any breach thereof and to assess what sum of money or other entitlement, if any, the appellant is entitled to receive and any consequential relief thereunder. *AND IT IS FURTHER ORDERED* that the appeal against the counterclaim be allowed and the High Court Judge is to determine any set off. *AND IT IS FURTHER ORDERED* that half the costs of this appeal and the proceedings in the High Court be awarded to the appellant. *AND IT IS LASTLY ORDERED* that the RM500 deposited by the appellant as security for costs of this appeal be paid to the appellant.

GIVEN under my hand and the seal of the Court this 9th day of December 1993.

Sgd

Deputy Registrar
Supreme Court Malaysia
Kuala Lumpur

Dato' VK Lingam, counsel of Newacres, submitted that there was no inconsistency in the Supreme Court order. He conceded, however, that there was a small contradiction in the order by the use of the phrase 'any breach' in the third part of the order. But he contended that NH Chan J was wrong in ignoring the second part of the order. He also submitted that the Court of Appeal was wrong in saying that there were contradictions in the order.

Mr Manokaran, counsel for Sri Alam submitted that there were inconsistencies and contradictions in the Supreme Court order. He said that in the first part of the order the Supreme Court ordered judgment as in prayer (1). By making this order the Supreme Court was in fact declaring all the breaches had been established. He also contended that in the second part of the order the contradicting part was the phrase 'to determine the extent of fiduciary duties and any breach thereof.' According to him, the fact that in the first part of the order the Supreme Court had found liability established it followed that the Supreme Court had already determined the extent of the fiduciary duties owed. (I note that when counsel mentioned the first and second parts of the Supreme Court order he was in fact referring to the second and third parts of the order.) Mr Manokaran submitted that in construing a document one must reject words which are inconsistent with what one assumes to be the main purpose of the document. In support of his submission he cited *Forbes v Git & Ors* [1922] 1 AC 256 and *Glynn & Ors v Margetson & Co & Ors* [1893] AC 351.

The Court of Appeal also relied on these two cases. It also relied on *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. In her judgment at pp 309–310, Siti Norma Yaakob JCA said:

> We are mindful of the fact that all the three authorities concerned the interpretations of three different documents but a close perusal of the same authorities disclose one common factor and it is this. When trying to reconcile a document that contains words or clauses that are inconsistent or repugnant to each other, the primary consideration is to ascertain the manifest object and intention why such a document came into existence in the first place. Once such a purpose or intention has been ascertained, words or clauses which are inconsistent with such a purpose or intention are excluded.

The Court of Appeal was aware that the three cases relied upon did not deal with a Court order. *Forbes v Git* is a case on the construction of a building contract. *Glynn & Ors v Margetson & Co & Ors* is on the construction of a bill of lading. *Lim Phin Khian v Kho Su Ming* is concerned with the interpretation of an Act of Parliament. It is true that these cases have a common factor. But assuming that there are inconsistencies in the Supreme Court order, does the same principle of construction apply? Both counsel have not been able to produce any authority to this court. Dato' VK Lingam, however cited an Indian case, *Seth Manakchand v Chaube Manoharlal & Anor* AIR 1944 Privy Council 46. In that case Sir George Rankin said:

> For the purpose of interpreting a decree no other document is so directly in point as the judgment or case in the nature of things have comparable force.

I agree with the passage quoted above. In the present case, however, the Supreme Court did not give a written judgment. The Court of Appeal knew that a written judgment would be useful in construing the Supreme Court order. Siti Norma Yaakob JCA said at p 31:

> Having stated thus, we now ask ourselves what was the main purpose and intention of the Supreme Court order. Unfortunately, we do not have the benefit of a written judgment from the Supreme Court to guide us. As such we have to look at all the surrounding circumstances.

In my view, in the absence of a written judgment from the Supreme Court, the Court of Appeal should have looked at the pleadings and in particular the prayers thereto, instead of looking at all the surrounding circumstances. It is a general rule that in civil proceedings, the decision of the court is based on the pleadings. The court will not decide on any issue which is not pleaded and prayed for. There are of course exceptions to this rule. See O 18 r 22 of the Rules of the High Court 1980.

I shall now proceed to examine the relevant part of the Supreme Court order.

In the first part of the order, the Supreme Court allowed Sri Alam's appeal and the order of Annuar J reversed and set aside.

In the second part of the order, the Supreme Court entered judgment for Sri Alam on the issue of liability by declaring that Newacres had acted in breach of its fiduciary duties. The Supreme Court did not make an order in respect of the sum claimed by Sri Alam as in prayer 2 of the re-amended statement of claim; or assess a sum of money or other entitlement which Sri Alam was entitled to receive from Newacres or on the question of interest.

Instead, the Supreme Court stated in the third part of the order 'that this case be remitted for trial for assessment by another High Court Judge to determine the *extent of the fiduciary duties and any breach thereof* and to assess what sums of money or other entitlement if any, the appellant is entitled to receive and any consequential relief thereunder'. (Emphasis added). In other words, in the third part of the order, the Supreme Court remitted the case for trial by another High Court Judge, who was:

(i) to determine the extent of the fiduciary duties;

(ii) to determine the extent of any breach of the fiduciary duties; and

(iii) to assess what sum of money or other entitlement, if any, the appellant was entitled to receive and any consequential relief thereunder.

In para 13 of the re-amended statement of claim, Sri Alam alleged that Newacres had at all material times acted in breach of its fiduciary duties.

In his judgment at p 79 of [1995] 4 MLJ 73, NH Chan J said:

> If judgment had been given for the plaintiff against the defendant for breach of fiduciary duty, then, there would be no need to remit the case to the High Court to determine if there was a breach of fiduciary duty by the defendant. There could not be a judgment on liability in a fiduciary relationship case unless there had been a breach of fiduciary duty. If the breach had already been determined by the judgment on liability as stated in order (2), then, it would be superfluous to ask the High Court, as stated in order (3), to determine 'any breach thereof' of the fiduciary duties, the extent or scope of which, in any case, has yet to be determined by the court.

I think there is a fallacy in the reasoning of his Lordship. The Supreme Court declared that Newacres had acted in breach of its fiduciary duties. The case was remitted to the High Court to determine the extent of the breach of fiduciary duties.

In her judgment at p 307, Siti Norma Yaakob JCA said:

> Thus by its order dated 9 December 1993, the Supreme Court had declared the respondent to be liable to the appellant following the former's breach of its fiduciary duties to the latter. However, this declaration runs contrary to the other part of the order directing a retrial of the case before another High Court Judge and specifying the function of the retrial judge to be 'to determine the extent of the fiduciary duties and the breach thereof. The contradiction here is that, since there is already a judgment entered on the issue of liability against the respondent — which must mean that the respondent had breached the fiduciary duties it owed the appellant — why was there the necessity to determine the extent of the fiduciary duties and whether the respondent has breached such fiduciary duties all over again?

The Supreme Court had entered judgment that Newacres had acted in breach of its fiduciary duties. What it wanted the High Court judge to do was to determine the extent of the fiduciary duties and to determine the extent of the breach. In other words the Supreme Court had found that there was a breach but the Supreme Court did not decide what was the extent of the breach. NH Chan J was given the task of determining the extent of the breach so as to enable him to assess the sum of money or other entitlement Sri Alam was entitled to receive.

In my view, the Supreme Court Order is very explicit. I find no inconsistency or contradiction in the order.

The Court of Appeal did not consider the extent of the fiduciary duties or the extent of the breach. Instead it went straight to identify Sri Alam's entitlements under the agreement and assessing the same.

NH Chan J however, considered the extent or scope of the fiduciary duties owed by Newacres, and any breach of them. But he concluded that Newacres was not in breach of its fiduciary duties. This conclusion runs contrary to the Supreme Court order.

I propose to consider the question of fiduciary duties in the context of the present case.

By declaring that Newacres had acted in breach of its fiduciary duties, the Supreme Court recognized that a fiduciary relationship existed between Sri Alam and Newacres under the joint venture agreement. Indeed, in *Newacres Sdn Bhd v Sri Alam Sdn Bhd*, the Supreme Court accepted the proposition that fiduciary relationship existed between parties to a joint venture agreement. Jemuri Serjan CJ (Borneo) in delivering the judgment of the Supreme Court in that case, (Jemuri Serjan CJ's judgment) said at pp 479–480:

> We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980 entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one. The question of the extent of the fiduciary obligations in this case, therefore, cannot be determined by submissions alone before us but must be ascertained from oral evidence as well as minute scrutiny of the relevant documents.

It will be recalled, the case went back to Annuar J for a full trial.

Jemuri Serjan CJ (Borneo) arrived at the conclusion as quoted above after considering the following cases.

His Lordship considered *Brian Pty Ltd v United Dominions Corp Ltd* [1983] 1 NSWLR 490. In that case both parties entered into a joint venture agreement on 23 July 1974. The joint venture agreement was amended on 28 July 1975 and it was alleged that there were breaches of fiduciary duties in respect of the variation. The Supreme Court of New South Wales (Court of Appeal) decided that members of a joint venture had fiduciary obligations inter se. In his judgment, Hutley JA said at p 496:

> That joint venturers have fiduciary relations, inter se, would seem to be essential for the efficacy of the device. The judgment of the majority of the New York Court of Appeal ... in *Meinhard v Salmon* 164 NE 545; 249 NY 458 (1928) supports this position.

The learned judge also referred to an article entitled 'Fiduciary Relationships' in *Oil & Gas Joint Ventures* (1970) 8 Alberta LR 233, where the writer, DA MaeWelliam stated, 'the most important characteristic of a joint venture is that a fiduciary relationship of trust and confidence arises therefore'. The decision of the Supreme Court of New South Wales (Court of Appeal) was affirmed by the High Court of Australia. See *United Dominions Corp Ltd v Brian Proprietary Ltd & Ors* (1984–85) 157 CLR1. In his judgment Jemuri Serjan CJ (Borneo) also quoted a passage in the judgment of Dixon J in *James Birtchnell & Anor v The Equity Trustees, Executors and Agency Co Ltd & Anor* (1928–30) 42 CLR 384 at pp 407–408. His Lordship was aware that that case dealt with fiduciary relationship in a partnership. His Lordship also cited *New Zealand Netherland Society v Kuys & Anor* [1973] 2 All ER 1222. In that case, Lord Wilberforce quoted

A the following passage in Dixon J's judgment in *James Birtchnell* case at p 122:

> The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties ... but also from the course of dealing actually pursued by the firm ...

B

After quoting the above passage, Lord Wilberforce then said:

> This was said in the context of partnership but the principle must be of general application.

C Jemuri Serjan CJ (Borneo) followed this statement and proceeded to say as stated in the passage quoted above. I agree with the passage in his Lordship's judgement that fiduciary relationship exists between parties to a joint venture agreement.

His Lordship did not decide whether the agreement dated 2 October 1980 was a joint venture agreement. Obviously this was a matter to be D decided at the trial. Since the Supreme Court order dated 9 December 1993 had declared that Newacres was in breach of its fiduciary duties, it can be concluded that the agreement dated 2 October 1980 was a joint venture agreement. I shall now look at the agreement to see whether this conclusion is right.

E Before looking at the agreement it is relevant to know the term 'joint venture'. In *Brian Pty Ltd v United Dominions Corp*, Samuels JA at pp 505-506 examined the term and then quoted a definition of the term from *Welliston on Contracts* (3rd Ed, 1959) Vol 2, at pp 555–506. The definition reads as follows:

F

> A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venture rexercises some degree of control.

G

Samuels JA adopted the definition in his judgment.

In their judgement in the High Court of Australia in *United Dominions Corp Ltd v Brian Pty Ltd*, Mason, Brennan and Deane JJ described joint venture in the following words:

H

> The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit with each participant usually (but not necessarily) contributing money, property or skill.

I I find that the definition of 'joint venture' adopted by Samuels JA is too restrictive. Perhaps, the definition was applicable in the case before him. The definition of the High Court of Australia is more general in character and I propose to adopt it in this judgment.

I think it is convenient to consider the question of whether the agreement dated 2 October 1980 is a joint venture agreement together with the question of whether fiduciary relationship exists under the agreement. Before I proceed to do so, I think it is relevant here to consider the definition of fiduciary relationship. I have not been able to find any case which defines the principle of fiduciary relationship. *Jowitt's Dictionary of English Law* (2nd Ed) Vol 1, p 788 defines the principle as follows:

> A person is said to stand in a fiduciary relation to another when he has rights and powers which he is bound to exercise for the benefit of that other. Hence he is not allowed to derive any profit or advantage from the relation between them, except with the knowledge and consent of the other person.

The definition is based on the work of Ernest Vinter in his *Treatise on the History & Law of Fiduciary Relationship and Resulting Trusts* (3rd Ed). For the purpose of this judgment, I shall adopt the above definition.

The relationship between Sri Alam and Newacres is governed mainly by the agreement concluded between them on 2 October 1980. The agreement is known as 'Joint Venture Agreement'. The preamble states that Sri Alam is the registered proprietor and beneficial owner of the said land and it wanted to develop it by the construction of residential and commercial buildings together with the necessary' infrastructure. Newacres agreed to develop the said land in accordance with the terms and conditions of the agreement. Clause (1) provides that Newacres was to develop the whole of the said land and to design, construct and complete for Sri Alam the said buildings including access roads, drainage and other housing amenities. Clause (2) provides that Newacres would give Sri Alam an advance of RM7,500,000. Clause (15) states that after the execution of the agreement and after the payment of RM7,500,000 by Newacres, Sri Alam would transfer the said land to Newacres subject to Sri Alam's entitlement under cl 5(a). The said properties described in cl 5(a) being held by Newacres on trust for Sri Alam. Immediately after the said land was transferred to Newacres the said land was deemed to have been sold to Newacres. Newacres would be entitled to deal with the said land as beneficial owner. Under cl 5(a) Sri Alam was allocated the plots specified therein completely developed together with all the necessary infrastructure and amenities. Newacres was to develop and construct the infrastructure and amenities and the relevant residential and commercial buildings at its own cost and expenses. The following are the plots allocated to Sri Alam:

Types of Plots	No of Plots
1 Low Cost Houses	1,105
2 Single Storey Terrace Houses	399
3 Low Cost Flats	264
4 Petrol Kiosks	2
5 Shop Houses	79
6 Double-Storey Terrace Houses	198
7 Semi-detached Houses	56

In cl 5(b) Sri Alam was to be allocated all the bungalow lots as approved in the layout plan. Clause 5(d) states that Sri Alam was entitled to and be

allocated 35% of the cinema unit, 35% of extra shoplots and 33% of extra residential plots fully developed by Newacres, at its own cost and expenses.

Clause 5(e) states that all the plots to be allocated to Sri Alam would be based on the layout plan as approved at the time of the execution of the agreement.

Under cl 10, Newacres was given the right to execute every stage of the development of the said land. Under cl 12 Newacres was to furnish to Sri Alam progress reports concerning the said development. Clause 22 states that both parties agreed that Newacres was 'entitled at its sole costs and expenses to amend the approved layout plan to increase the number of housing plot,' provided that Sri Alam would be allocated 12% of each type of building to be developed by Newacres on the increased plots. Under cl (1), Newacres was to retain the balance of the plots to be subdivided from the said land, other than what was allotted to Sri Alam under cll 5 and 22.

From the clauses contained in the agreement, it is clear that Sri Alam and Newacres agreed to develop residential and commercial buildings on the said land together with the infrastructure and amenities. Sri Alam provided the land and Newacres would carry out the development projects at its own costs and expenses. Under the agreement Sri Alam was to be allocated certain specified plots while Newacres would take the remaining plots. In my opinion, the agreement is a joint venture agreement.

Under the agreement, Newacres was given all the rights and powers to develop the said land not only for the benefit of Sri Alam but also for its own benefit. Under cl 15 the said land would be transferred to Newacres on trust for Sri Alam. Under cl 12 Newacres was not allowed to sell or transfer or dispose of any of the plots allocated to Sri Alam under cl 5(a) without the previous written consent of Sri Alam. Newacres was not allowed to charge the said land under the power of attorney to any other person except as security for the financing of the development project.

I am satisfied therefore, that the agreement established fiduciary relationship between Sri Alam and Newacres. I accordingly hold that Newacres owed fiduciary duties to Sri Alam. The Supreme Court had rightly declared that Newacres was in breach of its fiduciary duties.

Although the Court of Appeal did not expressly consider the extent of the fiduciary duties owed and the extent of the breach, and proceeded straight to consider Sri Alam's entitlements, it did so as a natural consequence of the loss suffered by Sri Alam as a result of Newacres' breaches of duties it owed Sri Alam. In her judgment at p 312, Siti Norma Yaakob JCA said:

> However, before we proceed to consider the various entitlements, we need to clear up a number of objections taken by the respondent, the first of which relates to the true nature of the appellant's cause of action. Whilst the pleadings aver to breaches of fiduciary duties, the respondent questions that the reliefs sought by way of the entitlements claimed to be due under cll 5, 22, 12(e) and 21 of the agreement are contractual in nature.
>
> We accept that situation to be in order for although the pleadings do not allude to a construction summons or a case of breach of contract, nonetheless, when it comes to assessing the entitlements due to the appellant, the various

and relevant clauses of the agreement that make provisions for such entitlements have to be interpreted to determine the scope of such entitlements. In so doing, we have not altered the nature of the appellant's cause of action, as determining and assessing the entitlements is not the cause of action, but merely an exercise of awarding the profits that is due to the appellant, *this being the natural consequence of the loss suffered by the appellant as a result of the respondent's breaches of the fiduciary duties it owed the appellant.* (Emphasis added.)

On the question of the sums awarded by the Court of Appeal, Dato' VK Lingam submitted to this court, that Court of Appeal had made a fundamental error in awarding contractual remedies. Mr Manokaran, on the other hand, submitted in his written submission (p 26) that the remedy by the Court of Appeal was basically to compensate Sri Alam for the loss suffered as a result of Newacres' breach of its fiduciary obligations.

In my view the Court of Appeal awarded the various sums against Newacres on the basis of the breach of its fiduciary duties. The judgment of Siti Norma Yaakob JCA is very clear on this point.

I have considered all the entitlements awarded by the Court of Appeal; and the submission of counsel for Sri Alam and Newacres. I have also read the judgment of My Lord the Chief Judge (Sabah and Sarawak) in draft.

I respectfully agree with the sums awarded by My Lord and the reasons given for giving such awards in the judgment in respect of the following items:

(1) A sum of RM1,008,000 for the loss of the seven bungalow plots with interest thereon from 3 July 1996 to date of realisation;

(2) A sum of RM1,078,000 to Sri Alam representing 35% of the cinema;

(3) A sum of RM3,916,000 to Sri Alam representing 35% of the supermarket;

(4) A sum of RM3,036,000 to Sri Alam representing 35% of the wet market;

(5) A sum of RM3,284,000 to Sri Alam representing 35% of the shopping complex;

(6) 35% of the food court to Sri Alam;

(7) Delivery of 219 units of low cost flats or in lieu thereof RM16,425,000 to Sri Alam;

(8) Delivery of 17 units of four storey shophouses, or in lieu thereof, RM7,650,000 to Sri Alam, to furnish detailed accounts of the cash allocation identifying corner lots to Sri Alam within two months of the delivery of this judgment and paying the landowner money found due within three months from the expiry of the two months limited for finishing the detailed accounts.

I shall now state my own view with regard to the question of set-off raised by Newacres, and the question of Sri Alam's entitlement in respect of the 103 light industrial units and the 1,600 luxury apartments.

A On set-off, I shall first consider whether Newacres was entitled to plead set-off as a defence. The law on set-off is clear.

In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 Salleh Abas LP, in delivering the judgment of the Federal Court, said at p 160:

B

> A set-off is a cross claim for a sum of money by a defendant against a plaintiff's claim or another sum of money for which the defendant is being sued ... But to constitute a set-off the sum of money meant as a cross claim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiff's claim and not as a separate cause or matter.

C In para 20 of the further re-amended statement of defence, Newacres stated:

> The defendant avers that the defendant is entitled to set-off against the plaintiff in respect of the following:
>
> (a) compensation for bungalow lots amounting to RM29,880,000;
>
> D (b) compensation for delayed delivery paid on the plaintiff's behalf in respect of sale and purchase agreements which the defendant had entered into on the plaintiff's behalf.

In the re-amended statement of claim, Sri Alam averred in para 16, as follows:

E

> Further, the defendant has wrongfully and unlawfully deducted and retained a sum of RM29,880,000 as compensation allegedly payable by the plaintiff to the defendant under the joint-venture agreement.

In my view the plea of set-off is proper in this case as it is a defence to the plaintiff's claim.

F The sum due to the plaintiff was RM39,587,090.57. Indeed this is the sum awarded by the Court of Appeal to Sri Alam as being the balance of the proceeds of sale collected by Newacres on behalf of Sri Alam for the sales of Sri Alam's units under cl 5(a). The Court of Appeal did not make an order on the Newacres' claim for set-off. Hence the sum was awarded to Sri Alam.

G The claim for set-off was in respect of compensation to be paid to Sri Alam. This is governed by cl 5(c) of the agreement which states:

> (c) The company shall compensate the developer for the profits it has foregone by reason of its not having allowed to retain 100 units of the said bungalow plots and the purchase price received or receivable by the
>
> H company in respect of the *number of plots approved for semi-detached houses herein before allotted to the company* shall be utilised towards meeting such profits foregone. The profits foregone shall be determined by taking the difference between the selling or estimated selling price of *the said semi-detached houses* and the costs or estimated costs of constructing the same in accordance with their specifications and plans. (Emphasis added.)

I Under the above clause, the profits foregone was the difference between the selling price of the semi-detached houses at RM25,000 each and the costs of constructing these houses at RM70,000 each. The difference between

the selling price and the costs of construction is RM155,000 in respect of each semi-detached house.

The question here is what is the right multiplier? Dato' VK Lingam contended that the right multiplier was 166. He said this figure was agreed upon between the parties at a meeting held on 1 April 1982. Then he referred to the minutes of the meeting. Paragraph 5 of the minutes states:

> 5 Under the joint-venture agreement, Sri Alam is to compensate Newacres for not allowing the latter to retain 100 units of the bungalow plots. The amount of compensation is, incidentally, to be worked out based on the profit (or estimated profit) of the 166 units of semi-detached houses. Thus, the sales value of the 166 units of semi-detached houses as worked out in 4 above shall be used also as a basis for computing the compensation payable to Newacres. This will be further discussed in the next meeting.

From the paragraph, it is clear that the figure 166, which is the total number of units of semi-detached houses, was not agreed upon at the meeting as the matter would be discussed further. No other document was produced to substantiate Dato' VK Lingam's contention.

I find the paragraph quoted above is of no significance to the present case.

Mr Manokaran, on the other hand, argued that the multiplier should be 56. He said that the words, the 'said demi-detached houses' referred to the semi-detached houses allotted to the company, ie 56 units.

I accept Mr Manokaran's submission. Clause 5(c) of the agreement clearly states the number of plots for semi-detached houses allotted to the company (which is Sri Alam), as a basis for determining the profits. Under cl 5(a), Sri Alam was allotted 56 plots. I should state here that the figure 166 was not in existence in the layout plan when it was amended in 1982, when Newacres replaced its own plots of 110 units of demi-detached houses with the plots for the luxury apartments. In the circumstances I am unable to accept the figure 166 as multiplier as it was no longer in existence when the further re-amended statement of defence was filed on 15 April 1994.

In my view the right multiplier is 56. I note that the Court of Appeal had adopted the same multiplier. In her judgment at p 316, Siti Norma Yaakob JCA said:

> The answer lies in the interpretation to be given to para (c) itself. That particular paragraph states the compensation is to come from the proceeds of sale 'in respect of the number of plots approved for semi-detached houses herein before allotted to the company.' Since 56 semi-detached houses have been allotted to the appellant under para (a) item 7, the multiplier cannot be any other figure but 56. Thus, on a multiplier of 56, the appellant is to compensate the respondent on the calculation of 56 x RM155,000 = RM8,680,000.

Applying the multiplier 56, Sri Alam was to compensate Newacres RM8,680,000 (56 x RM155,000) plus RM8,407,340.35 which is the total

amount listed as items (b), (c), (d), (f), (g) and (h) in Newacres' document. The total of these two figures is RM17,087,340.35. I accordingly find that Newacres is entitled to set-off RM17,087,340.35 from the total amount due to Sri Alam ie RM39,587,090.57. After the set-off the balance of RM22,499,750.22 should be paid to Sri Alam.

Sri Alam is entitled to be paid interest at 8%pa on the sum of RM22,499,750.22 from 10 December 1984 to date of realization.

I shall now turn to the items referred to by the Court of Appeal as the new units, namely the 1,600 units of luxury apartments and the 103 light industrial units. I agree with the Court of Appeal that these are new units. I need not go further as the judgment of the Court of Appeal is explicit on this point. My Lord the Chief Judge is also of the view that these units are new units.

Dato' VK Lingam submitted that the Court of Appeal was wrong in awarding RM105,600,000 to Sri Alam. He said that the 1,600 luxury apartments were planned to be built by the Newacres on its on portion of its entitlment of land where 110 units of semi-detached houses were to be built. Under 1979 layout plan, Newacres was to build 166 semi-detached houses of which 56 units were to be allocated to Sri Alam under cl 5(a) item 7, of the joint-venture agreement. According to him, in 1992 Newacres built only 60 units and decided to build luxury apartments on the land instead. The layout plan was amended to include the luxury apartments. He added that no building plan for the luxury apartments had been approved and the apartments had not been built yet.

With regard to the 103 light industrial units, Dato' VK Lingam submitted that according to the 1979 layout plans, Newacres was to build 3,350 units of low cost houses. When the layout plan was amended, the total number of low cost units was 3,029. Therefore, he said, there was a shortfall of 321 low cost housing units. According to him the land on which the 321 units were to be built belonged to Newacres. He said that Sri Alam had received its entitlement of 1,105 units.

In his written submission, Mr Manokaran said that Newacres was already compensated for the drop in its entitlements. He said that Newacres was responsible for the drop in entitlement by amending the layout plan. He submitted that under the joint venture agreement Newacres had fiduciary obligations. It could not 'pursue any undertaking which will benefit itself in greater measure than that contemplated by the joint venture agreement to the exclusion of its joint venture partner'. With regard to the luxury apartments, Mr Manokaran submitted that the land area allotted for semi-detached houses was 13.72 acres. The 60 semi-detached houses were built on a land area of 6.47 acres. Therefore, he said the area of the remaining land was 7.25 acres. He contended that Newacres obtained the 16.8 acres of land needed for the luxury apartments by taking public utility land when the 1979 layout plan was amended.

The Court of Appeal found that the figure was 16.8 acres. In her judgment at p 325, Siti Norma Yaakob JCA said:

> The luxury apartments have been constructed following a saving of public utility land and the light industrial units on a saving in the decrease of low cost houses.

I note that according to the 1979 layout plan, the total number of low cost terrace houses was 3,350. The total number of semi-detached houses was 166. When the joint venture agreement was concluded in 1980 both Sri Alam and Newacres agreed to carry out the development projects in accordance with the 1979 layout plan. The layout plan was amended by Newacres in 1982. In the amended plan, the number of low cost terrace houses was reduced to 3,029. Newacres claimed the shortfall of 321 belonged to it. It was on the land of the 321 units that Newacres built the 103 light industrial units.

Under cl 22, Newacres had the power to amend the layout plan. What then was the effect of the amendment made to the layout plan in 1982? If Newacres did not reduce the total number of low cost terrace houses, then the sale value of the 321 low cost houses would be (321 x 50,000) RM16,050,000. But the sale value of 103 light industrial units would be (RM600,000 x 103), RM61,800,000. The amended layout plan, however, did not affect Sri Alam's entitlement. It remained the same as in the 1979 layout plan.

Similarly, Newacres' entitlement to semi-detached houses according to the 1979 plan was 110. The sale price would be (RM225,000 x 110), RM24,750,000. The sale price of the 1,600 units of luxury apartments would be (RM100,000 x 1600), RM160,000,000.

I agree with Mr Manokaran that from the above figures, Newacres would benefit itself in greater measure to the exclusion of Sri Alam.

In her judgment at p 326, Siti Norma Yaakob JCA said:

> By the very nature of the joint venture agreement, we consider that the appellant cannot be denied its entitlement to new units constructed on areas saved by the respondent and denial of such entitlement is in itself evidence of a breach of the respondent's fiduciary duties to distribute all profits earned from the joint venture agreement to the appellant.

In my opinion, in respect of the 103 light industrial units, there was a clear breach of fiduciary duties. Newacres would derive greater profit and advantage from the fiduciary relationship. Sri Alam was, therefore, entitled to a certain percentage of the profits. The question that arises here is what is the extent of the Sri Alam's entitlement? The Court of Appeal was of the view that the landowner would be entitled to 33% in respect of residential units and 35% on commercial buildings. Siti Norma Yaakob said at p 326:

> Clause 22(b) speaks of 'increased' units and this must of necessity be additional units of the particular types of buildings to be constructed as described and identified by the legend in the original layout plan. The 1983 amendments introduced new types of residential and commercial buildings not found in the original layout plan. These took the form of the luxury flats and the light industrial units. Since cl 22(b) makes provisions for increased or additional units only, the extent of entitlement for new units is not covered by that clause. However, PW1, the appellant's managing director, who testified

in the first trial stated that in the negotiations leading to the execution of the joint venture agreement, he had raised the extent of the appellant's entitlements of the project with the respondent's two directors and he was assured by them 'that 33% residential and 35% commercial buildings would be allocated to Sri Alam. It was also discussed that if layout plan was changed and the units increased, Sri Alam would receive 12%'. Thus, from the very beginning there was a clear indication that there was to be a distinction between 'increased' and 'new' units and the rates of entitlement applicable to such units.

I accept the formula adopted by the Court of Appeal.

Dato' VK Lingam told this court that Newacres was currently building the light industrial units. In the circumstances Sri Alam is entitled to 35% of the units ie 36.05 units. The selling price per unit is RM600,000. I therefore award Sri Alam (RM600,000 x 36.05), a sum of RM21,630,000. The sum of RM21,600,000 awarded by the Court of Appeal is accordingly replaced by the sum of RM21,630,000.

It is not in dispute that the 1,600 luxury apartments had not been built. The layout plan has been further amended on 29 August 1992. The amended plan shows that a portion of the area marked for the luxury apartments, contains plots for houses, while the remaining portion is marked white. I am unable to ascertain how many units of houses are to be built on those plots and what is the area of the portion marked white. In any event, the plan for the 1,600 luxury apartments was no longer in existence after the layout plan was amended in 1992.

In the circumstances, I am of the view that the land where the remaining 110 units of semi-detached houses were to be built, belongs to Newacres. This was part of the land meant for the luxury apartments. Under the 1979 layout plan, the area allocated for the 166 semi-detached houses was 13.72 acres. I therefore set aside the order of the Court of Appeal, and substitute it with an order that the land where the remaining 110 units of semi-detached houses were to be built, belongs to Newacres. The land area belonging to Newacres is 13.72 acres minus the area occupied by the 56 semi-detached houses. The remaining land, if any shall go to Sri Alam. The award of the Court of Appeal in respect of the 1,600 luxury apartments is set aside.

For the reasons stated above, I now state my conclusion.

Newacres shall pay:

(1) a sum of RM1,008,000 to Sri Alam for the loss of the seven bungalow plots with interest thereon from 3 July 1996 to date of realisation;

(2) a sum of RM1,078,000 to Sri Alam representing 35% of the cinema;

(3) a sum of RM3,196,000 to Sri Alam representing 35% of the supermarket;

(4) a sum of RM3,036,000 to Sri Alam representing 35% of the wet market;

(5) a sum of RM3,284,000 to Sri Alam representing 35% of the shopping complex;

(6) 35% of the food court to Sri Alam; A

(7) a sum of RM22,499,750.20 to Sri Alam (after setting off RM17,087,340.35 from RM39,587,090.57) with interest at 8% pa on the sum of RM22,499,750.22 till the date of realisation;

(8) a sum of RM21,630,000 to Sri Alam representing 35% of the 103 light industrial units. B

1,600 luxury apartment entitlement:

(9) The land where the remaining 110 units of semi-detached houses were to be built, belongs to Newacres; ie 13.72 acres minus the area occupied by the 56 semi-detached units. The remaining land, if any, will go to Sri Alam. C

Newacres shall deliver to Sri Alam:

(10) 219 low cost flats or in lieu thereof RM16,425,000 to Sri Alam;

(11) 17 units of four-storey shophouses or in lieu thereof RM7,650,000. D

Newacres shall furnish:

(12) detailed cash accounts of the cash allocations identifying corner lots to Sri Alam within two months from the date of the delivery of this judgment and paying Sri Alam whatever money found due within three months from the expiry of two months limited for furnishing the detailed accounts. E

(13) Except for item (7), Newacres shall pay interest at 8%pa on all sums due and payable from the date of this judgment till date of realisation.

In the light of my awards above, I order the costs of this appeal to be taxed and 3/5 of such taxed costs shall be paid by Newacres to Sri Alam. F

Abu Mansor FCJ: In this appeal I had had the opportunity of reading the judgment of the Chief Judge (Sabah & Sarawak), with which I entirely agree in particular that there is, in the main, no ambiguity in the order of the Supreme Court dated 9 December 1993 and speaking for myself what was most important was that the Supreme Court had found that there were breaches of fiduciary duty and clearly it had entered judgment. What is fiduciary relationship and duty? That had been very lucidly given by the learned Chief Justice (Sabah & Sarawak) and, in this regard, if I may mention, I also had been given a copy of his judgment by his Lordship Justice Zakaria Yatim FCJ. I associated myself with his judgment on what is fiduciary duty or relationship and what amounts to breaches of it. Other than that I wish to support Zakaria FCJ on the points where he had supported the judgment of the Chief Judge (Sabah & Sarawak) and where, Zakaria FCJ had held different views from that of the learned Chief Judge such as the award of compensation for the industrial units in item (8) at p 410 of his judgment, with respect, I wish to state I associate myself with the judgment of the learned Chief Judge for reasons given by him, on that very point canvassed by YA Dato' Dr Zakaria. G H I

A At this juncture I also wish to have the opportunity of saying I fully supported the Chief Judge (Sabah & Sarawak) in particular as to his approach in granting measure of compensation for the several breaches of fiduciary duty found arising out of the joint venture agreement of the parties.

B And lastly I fully support his Lordship the learned Chief Judge (Sabah & Sarawak) in his decision to confirm the award of compensation wherever necessary, rather than remit the case to the lower court for assessment and I support his cogent reasons for refusing to do so.

This approach is certainly in line with the recent trend adopted by this court in its decision in *R Rama Chandran v The Industrial Court of Malaysia* C *& Anor* [1997] 1 MLJ 145, which was a case of a certiorari application but its principle of and reason for not wanting to remit the case to the Industrial Court for entry of consequential relief was the same and most admirably stated, at pp 184–185 of the judgment by his Lordship Chief Justice Malaysia, Tun Eusoff Chin, in a majority judgment thus:

D > Having carefully considered the question, I am not persuaded by the submission of the learned counsel for the society that we should remit the case to the Industrial Court with a direction to make the necessary consequential orders. As far as possible the anxiety and endeavour of the court should be to remedy an injustice when it is brought to its attention. 'On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests E of the parties. In the circumstances, justice demands that to avoid further delay and expense, we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose.

I would like to say I associate myself with this judgment of the learned Chief Justice in not remitting this case to the lower court because to have done so F was to cause injustice to parties and our refusal to do so was to avoid further delay and expense.

Having said this for I have nothing more to add.

Order accordingly.

G Reported by Jafisah Jaafar

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